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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

CALIFORNIA,
Petitioner,

v.

JESS RODERICK MITCHELL,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
SIXTH DISTRICT COURT OF APPEAL
OF THE STATE OF CALIFORNIA

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

1. Is an erroneous instruction on an element of an offense subject to harmless error analysis if, under the instructions the jury received, the jury could have made findings and considered evidence establishing that the jury would have made the requisite findings for conviction had it been properly instructed? Yes.

2. Given the fact that materiality is an element of the California crime of perjury, could it be harmless error for a trial court in a California perjury trial to instruct the jury that the defendant's allegedly perjurious statements were material ones? Yes.

3. Is an erroneous instruction on an element of an offense actually harmless error if the findings the jury made and the evidence it considered, when assessed in light of each other, establish that the jury would still have convicted had it been properly instructed? Yes.

4. If a state prosecutes a defendant for perjury because he allegedly gave a false name (and made other false statements) in an application for the driver's license, and if the jury is instructed not to convict without finding that the defendant made a false statement in the application, and if the jury considers overwhelming evidence that the state issued the license in the false name, was it actually harmless error for a trial court to have instructed the jury that the defendant's allegedly perjurious statements were material ones? Yes.

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SIXTH DISTRICT COURT OF APPEAL OF CALIFORNIA

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the California Court of Appeal, Sixth District, entered on December 19, 1995.

OPINIONS BELOW

Petitioner seeks review of the decision of the California Court of Appeal, Sixth District, in *People v. Mitchell* (H012785), in which the court held that the trial court committed reversible error in a perjury prosecution by instructing the jury that the defendant's allegedly perjurious statements were material. Appendix A (pp. 23-24).

JURISDICTION

Petitioner sought review in the California Supreme Court. The California Supreme Court denied review on March 27, 1996. Appendix B. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS

This case raises the question of the circumstances under which a defendant's right to due process under the Fifth and Fourteenth Amendments to the United States Constitution and to a jury trial under the Sixth and Fourteenth Amendments require reversal of a conviction if the trial court instructs the jury that the prosecution has proved one of the elements of the offense.

STATEMENT OF THE CASE

Through several amended informations the District Attorney of Santa Clara County charged respondent with ten crimes: robbery, attempted murder, assault with a firearm, auto theft, possession of stolen property, fraudulent use of an access card with intent to defraud, carrying a concealed weapon in a vehicle, two counts of carrying a loaded firearm in a vehicle, and perjury in applying for a driver's license. The jury convicted on all counts.

In a decision filed on December 19, 1995, California's Sixth District Court of Appeal reversed the perjury conviction and affirmed the judgment in all other

respects. Appendix A, p. 26. On March 27, 1996, the California Supreme Court denied review. Appendix B.

STATEMENT OF FACTS AND PROCEDURAL CIRCUMSTANCES

Some person or persons made an application for a California driver's license to the Department of Motor Vehicles (DMV) in the name of one "Jesse Willard." The application was dated February 20, 1990, and was signed "Jesse Willard." The application form asked whether the applicant had previously applied for or been issued a California driver's license. In the space provided on the form for the answer to this question, the application was marked with an "X" in the answer box designated "No." The application also asked whether the applicant had applied for a California driver's license or identification card under a different name within the past seven years. Again, the answer box designated "No" was marked with an "X." People's Exh. 69a.

The Department of Motor Vehicles issued driver's license A7270602 in the name of "Jesse Willard" on February 20, 1990. People's Exh. 69a. On April 19, 1990, a gun was sold to one "Jesse Willard," who used California driver's license A7270602 as identification. RT 796, 807-809; People's Exh. 70a. On May 8, 1991, another gun was sold to "Jesse Willard," who again used that license as identification. RT 803-804; People's Exh. 70b.

Respondent's real name was Jess Mitchell. RT 526-527, 552-553. He had several California driver's licenses in that name before 1990. RT 2419-2420; People's Exh. 125.

Respondent testified that he paid a company $500 (RT 2425, 2426, 2429) to fix his credit problems

and that as part of the service the company helped him obtain a driver's license in a different name, "Jesse Willard." RT 2400-2401, 2402, 2423-2424, 2426-2427, 2429, 2434-2435, 2526. Although the information on the driver's license application came from information he provided to the company (RT 2427), respondent contended that he did not fill out the application (RT 2402, 2426-2427, 2430, 2433) and, indeed, never saw it (RT 2427) until the trial. RT 2430. He denied signing it. (RT 2427.) He went to the DMV office (RT 2428), was met there by a woman (RT 2402, 2429), and was "told to sign my name as such-and-such, Jesse Willard, and take a thumbprint, do the picture, and things to that effect." RT 2402. He acknowledged that his picture and thumbprint appear on the license the DMV issued to him in the name of "Jesse Willard." RT 2434-2435; People's Exh. 69a.

Respondent represented himself at trial. He addressed the perjury count as follows in his closing argument to the jury:

> "I had no knowledge that application ever existed until he [the prosecutor] showed it to me as evidence. I have to take responsibility though for it being instituted because it was for me, it wasn't for anyone else. That was for Jess Mitchell. But I can't take responsibility for somebody actually having filled it out and with -- well, you know the name they put on it because that's what I asked for. But I did go through a company and asked for that. I did actually do that. You can make a joke out of it, but that's what I did." RT 2721.

The jury was instructed as follows:

" . . . Count ten alleges a violation of the California Penal Code Section 118, perjury, defined as follows: every person who declares on any driver's license application under penalty of perjury and willfully states as true any *material matter* [emphasis added] which is false and which such person knows to be false is guilty of the crime of perjury in violation of section 118 of the California Penal Code.

"In order to prove this crime, each of the following elements must be proved: one, a person declared under the penalty of perjury that the driver's license application was true and correct with knowledge that the statement was made under penalty of perjury. Two, the declaration under penalty of perjury was committed [sic: "permitted"] by law. Three, such person declared as true a matter which was false and which such person knew was false. And four, such person had the specific intent to declare falsely under penalty of perjury.

"It is alleged that the defendant made the following false statements in this case. That he had never before had a California's driver's license, that

> he had not applied for a California driver's license under a former or a different name within the past five years[,] and that he gave a false name. *If you find that the defendant made one or more of the statements as charged, such statements were material matters within the definition of perjury. . . .*" RT 2750 [Emphasis added].

Relying on the California Supreme Court's decision in *People v. Kobrin*, 11 Cal.4th 416, 428-430 (1995), the Court of Appeal reversed the perjury conviction with the following explanation:

> "Because the removal of the materiality issue from the jury is reversible per se, the trial court's error is incurable by harmless error analysis. [Citation.]" Appendix A, p. 24.

REASONS FOR GRANTING THE WRIT

United States v. Gaudin, 515 U.S. ___, ___; 115 S.Ct. 2310, 2320 (1995), established that the Constitution requires the state to prove each element of a crime to a jury, not a court, before a defendant may be lawfully convicted of that crime. The government in *Gaudin* did not raise and, hence, this Court did not address the issue of whether and, if so, under what circumstances it is harmless error for a trial court to decide an element of an offense. *Id.* at 2321 (Rehnquist, C.J., concurring). This case presents that issue.

Because materiality is an element of the California crime of perjury (*People v. Kobrin*, 11 Cal.4th

at 426-427, *supra*; Cal. Pen. Code, § 118), the trial court committed federal constitutional error under *Gaudin* by deciding the materiality issue itself rather than submitting it to the jury. We contend here, as we did in state court, that the error was harmless. Thus, this case presents the logical followup to *Gaudin*.

We propose a harmless error approach that functions coherently, applies to all instructional errors on elements of an offense, harmonizes the vast majority of the case law (including all this Court's cases about instructional error on elements of an offense), and soundly reflects the values of due process and the defendant's right to a jury trial. The essence of that approach is as follows: to decide whether an instructional error on an element of an offense is harmless, a reviewing court must determine from what the jury *actually did* (the findings the jury made and the evidence it considered) what the jury *would have done* (i.e., whether it would still have convicted) if it had been correctly instructed.

We begin by explaining the approach, which we call a "jury-findings, evidence-considered" test. Section A. Next we apply the test to the case at bench. Section B. Finally, we review the *Kobrin* opinion and related Ninth Circuit authority to demonstrate the need for this Court to clarify this area of the law. Section C.

A. The Jury-Findings, Evidence-Considered Test: A Universal, Three-Step Approach To Analyzing Instructional Errors On Elements Of An Offense

1. Exactly What Was The Error?

Federal constitutional instructional error occurs if "'there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution. *Boyde v. California*, 494 U.S. 370, 380 (1990). [Footnote omitted.]" *Estelle v. McGuire*, 502 U.S. 62, 72 and n. 4 (1991). Because a harmless error analysis must be predicated upon evidence the jury considered, a reviewing court must determine from the instructions the jury received what evidence the jury in fact considered. *Yates v. Evatt*, 500 U.S. 391, 403-404 (1990). It likewise follows that the first step in a harmless error analysis is a foundational determination of exactly what the error was in the first place. That is, a reviewing court must determine not just *whether* the jury misunderstood the law but exactly *how* it did so and, hence, what evidence it considered and what findings it made.

2. Could The Error Have Been Harmless?

After having determined how an instruction caused a jury to misunderstand the law, a reviewing court next must inquire whether the error "could be harmless" or, conversely, whether the error is "reversible per se." The following is the test: given the jury's particular misunderstanding of the law, *could* the jury nonetheless have made findings and considered evidence that would establish that the jury would have made the requisite findings had it been properly instructed?

In conducting this inquiry, a reviewing court considers the offending instruction in relation to the statutory definition of the offense. A court does not delve into the record to discover what evidence was actually presented to the jury. So, for example, if a jury were instructed to find the defendant guilty if he has blue eyes and lives in the United States (see *Carella v. California*, 491 U.S. 263, 269 (1989) (Scalia, J., concurring)), the error would fail the "could be harmless" test because, given that instruction and the definition of the charged offense, the jury could neither make findings nor consider evidence that would establish that the jury would reach the required finding for conviction under a proper instruction.[1/]

3. Was The Error Actually Harmless?

If an error could be harmless, a reviewing court poses a third and final question: was the error actually harmless? The test is as follows: Given the jury's particular misunderstanding of the law, did the jury nonetheless actually make findings and consider evidence

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1. Lest it be contended that the "could be harmless" test disqualifies only hypothetical errors, we note two recent California cases of per se reversible instructional error on an element of an offense: *People* v. *Corey*, 35 Cal.App.4th 717, 725-726 (1995) [selling a security by means of false statements or omissions (Cal. Corp. Code, § 25401) requires defendant's knowledge that the statement was false; jury instructed to determine only whether the defendant made the statements in question; jury told that evidence of defendant's knowledge irrelevant; both parties precluded from fully eliciting evidence on the issue; conviction reversed]; *People* v. *Jerry R.*, 29 Cal.App.4th 1432, 1440-1441 (1994) [in court trial of discharging firearm in grossly negligent manner (Cal. Pen. Code, § 246.3), trial court erroneously ruled that requisite mental state does not include intent to shoot; reversible error].

establishing that the jury would have made the requisite findings if it had been properly instructed?

When an instructional error (or the ruling of law that produces it) prevents a defendant from adducing substantial evidence on the element in question, a reviewing court cannot determine whether the jury, if it had considered such evidence, would have made the requisite findings for conviction. Accordingly, if the error prevents a defendant from adducing substantial evidence on the element in question, the error is not harmless. See *Rose v. Clark*, 478 U.S. 570, 579, n. 7 (1986) [an error that "affect[s] the composition of the record" creates "inherent difficulty in evaluating whether the error prejudiced the [defendant]. . . ."]

4. <u>The Basis Of The Jury-Findings, Evidence-Considered Test</u>

This three-part analysis reconciles the different harmless error formulations this Court has offered in instructional error cases. See *Rose v. Clark*, 478 U.S. at 580, *supra* [instructional error on element of an offense harmless if predicate facts found by the jury "conclusively establish" the element in question]; *Pope v. Illinois*, 481 U.S. 497, 503, fn. 6 (1987) [instructional error on element of offense harmless if "the facts found by the jury were such that it is clear beyond a reasonable doubt that if the jury had never heard the impermissible instruction its verdict would have been the same"]; *Carella v. California*, 491 U.S. at 271, *supra* (Scalia, J., concurring) [instructional error on element of an offense harmless if "the predicate facts relied upon in the instruction, or other facts necessarily found by the jury, are so closely related to the ultimate fact to be presumed [i.e., the element] that no rational jury could find those facts without also finding that ultimate fact. . . ."]; *Yates*

v. Evatt, 500 U.S. at 403-405, *supra* [instructional error on element of the offense harmless if it did not contribute to the verdict, i.e, if the evidence considered by the jury overwhelmingly establishes the element]; *Sullivan v. Louisiana*, 508 U.S. ___; 113 S.Ct. 2078, 2082 (1993) [defective reasonable doubt instruction can never be harmless because without a true finding of guilt beyond a reasonable doubt reviewing court has no object on which to base a harmless error analysis].

B. The Jury-Findings, Evidence-Considered Test Applied To This Case

1. The Error

In this case, the trial court's error was straightforward: its instructions created not only a reasonable likelihood (*Estelle v. McGuire*, 502 U.S. at 72 and n. 4, *supra*) but a virtual certainty that the jury believed it could convict respondent of perjury without determining (or even considering) whether his allegedly perjurious statements were material.

2. The Error Could Have Been Harmless.

The error could have been harmless if the jury could nonetheless have made findings or considered evidence establishing that the jury would have found materiality had it been properly instructed.

To apply this test (and the "actually harmless" test as well), one must begin with the meaning of "materiality." Under California's perjury law, "materiality" in essence means "relevance": a statement is material if it "could have 'influenced the outcome of the proceedings.' [Citations.]" *People v. Hedgecock*, 51 Cal.3d 395, 405 (1990). See Cal. Penal Code, § 123

[statement may be perjurious even if defendant did not know the materiality of it or if it did not affect the proceeding; " . . . sufficient that it was material, and might have been used to affect such proceeding"]; *People v. Pierce*, 66 Cal.2d 53, 61 (1967) ["The test is whether the statement could probably have influenced the outcome of the proceedings. . . . "]; *People v. Matula*, 52 Cal.2d 591, 595 (1959) [". . . could reasonably influence the outcome of the proceedings"].

The proceeding in question here was an application for a driver's license. The "outcome of the proceeding" was the issuance of the license to "Jesse Willard." Therefore, each of respondent's statements was material if that statement could have influenced the Department of Motor Vehicles to issue the driver's license in the name of "Jesse Willard."

If respondent did aver in the application that his name was "Jesse Willard" and if the DMV did then issue a license in that name, it would be apparent from those two facts alone that the statement not only could have influenced but in fact did influence the DMV to issue the license in the name of "Jesse Willard" and, hence, was a material statement. Therefore, if the jury could have found or considered overwhelming evidence that respondent gave his name as "Jesse Willard" in the driver's license application and that the DMV then issued a driver's license to "Jesse Willard," the instructional error could have been harmless because the jury could have made findings or considered evidence establishing that under proper instructions it would have found the false-name statement to be material. To determine whether the error could have been harmless, then, it remains only to determine whether, under the instructions it received, the jury could in fact have made findings or considered overwhelming evidence that

respondent gave his name as "Jesse Willard" and that the DMV then issued a license in that name.

The false-name statement was one of the three statements on which the perjury charge was based, and the jury was instructed to determine whether any of the allegedly perjurious statements was made by respondent with the requisite intent. Accordingly, the jury could have considered evidence that respondent made that statement; indeed, the jury necessarily considered such evidence.

The jury also could have considered evidence that the DMV issued the driver's license to "Jesse Willard." To prove that it was respondent who made the false-name statement (and/or that he did so with the intent to falsify), the prosecution had to show that respondent was trying to appear to be "Jesse Willard." Accordingly, the prosecution could have adduced (and the jury would then have considered) evidence that respondent not only applied for but used a driver's license in the name of "Jesse Willard." Such proof necessarily would have entailed the foundational showing that the DMV issued a license to "Jesse Willard." We conclude that the jury could also have considered evidence that the DMV issued a license to "Jesse Willard."

3. The Error Actually Was Harmless.

As it happened, the evidence that respondent made the false-name statement was not overwhelming. By asserting that someone else had filled out the application for him and by at least implying that he did not authorize that act, respondent presented substantial evidence that he did not in fact make the statement (or the other two allegedly perjurious statements). However, the jury necessarily found that respondent made the false

statement. Respondent's "someone else did it" defense applied equally to all three allegedly perjurious statements. Accordingly, the jury could not have convicted respondent of perjury, as it did, without rejecting that defense and finding that he did in fact make the three statements. Likewise, the record establishes that the jury in effect found that respondent made the false-name statement.

On the question of whether the DMV issued the license in the false name, the evidence *was* overwhelming. The false license was admitted into evidence (People's Exh. 69a), the prosecution showed that, among other things, respondent had used it to purchase guns (RT 796, 803-804, 807-809; People's Exhs. 70a, 70b), and respondent himself admitted its existence. See RT 2423-2424 [respondent accepting prosecutor's repeated assertion that respondent got "a perjured license"]; RT 2427-2728 [false license was mailed to him at an address in Sunnyvale, not Vallejo]; RT 2436 [acknowledging that he signed the false driver's license]. Moreover, the jury would necessarily have considered evidence that the false license issued because, as explained above, the issuance of the license provided the foundation for a showing that respondent used such a license, which supported an inference that he intended to present himself as "Jesse Willard," which in turn supported an inference that he had reason to make the false statements in the application, which in turn tended to show that he did in fact make those statements with the requisite intent.

In sum, the findings the jury made and the evidence it considered regarding the making of the false-name statement and the issuance of the false license established that, had it been properly instructed, the jury would have found the false-name statement to have been material with regard to the issuance of the license.

Accordingly, the error not only could have been harmless but actually was harmless.

C. By Granting Certiorari, This Court Can Correct Basic, Widespread Errors In The Way Reviewing Courts Analyze Whether An Instructional Error On An Element Of An Offense Is Harmless.

This case is an unpublished opinion by a California Court of Appeal. It includes only a perfunctory treatment of the harmless error question. However, the opinion reflects a misunderstanding of the law that has now become the rule rather than the exception in California state courts (*People v. Kobrin*, 11 Cal.4th at 428-430, *supra*) and in the Ninth Circuit as well. *United States v. Gaudin*, 997 F.2d 1267, 1272 (9th Cir. 1993). *Kobrin* both exemplified the misunderstanding and established it as the law in California. Accordingly, we turn to that case to show how, by granting certiorari in this case, the Court can clear up the confusion in this area of the law.

In *Kobrin*, the California Supreme Court dealt with the question of harmless error in the context of the same erroneous instruction that was given in this case. Although *Kobrin* left open the possibility that what it called an "omitted instruction" could be harmless error, the court expressly declined to set forth a test under which such an error (which it did not define) would actually be harmless. *People v. Kobrin*, 11 Cal.4th at 428, n. 8, *supra*. Instead, the court held that for three reasons the error in that case was not harmless. *Id.* at 428, n. 8; and 428-430. In this respect the opinion is at least partly self-contradictory. It professes not to set forth a harmless error test (*id.*, at 428, n. 8), yet in

stating three reasons why the error was not harmless it establishes those three reasons as a de facto test. Two of those reasons are conclusory labels. Subsections 1 and 2. The third reason is the sound principle that an instructional error on an element of an offense is not harmless if it prevented the defense from adducing substantial evidence on the element in question. However, that factor is not present in most cases and, hence, of limited use. More importantly, *Kobrin* failed to explain how to determine whether in fact the instructional error has prevented the defense from adducing substantial evidence on the element in question. Subsection 3.

1. The Flawed "Error Characterization" Approach

Kobrin found the instructional error to be prejudicial first because "the jury's findings on materiality were not merely imperfect . . . [but] nonexistent due to the instructional omission." *Id.* at 429. This purported rationale merely restates the problem in answer form. Problem: may a flawed instruction on an element of an offense be harmless if it prevents the jury from making a finding on the element in question? Nonanswer: a flawed error on an element of an offense is not harmless because it prevents the jury from making a finding on that element.

To reach this conclusion, the court misinterpreted *Sullivan v. Louisiana*. *People v. Kobrin*, 11 Cal.4th at 428-429, *supra*. *Sullivan* held that a flawed reasonable doubt instruction may never be harmless error. It explained:

> "There being no jury verdict of guilty-beyond-a-reasonable-doubt, the

> question whether the *same* verdict of guilty-beyond-a-reasonable-doubt would have been rendered absent the constitutional error is utterly meaningless. There is no *object*, so to speak, upon which harmless-error scrutiny can operate." *Sullivan v. Louisiana*, 508 U.S. at ___; 115 S.Ct. at 2082, *supra*. (Emphasis in the original.)

This passage makes clear that the "object . . . upon which harmless scrutiny can operate" is a jury verdict of guilty beyond a reasonable doubt. The jury returned such a verdict in *Kobrin* (and in this case). Nothing in *Sullivan* states or suggests that an instruction that prevents a jury from making a finding on an element also deprives the reviewing court of a jury verdict of guilty beyond a reasonable doubt and, hence, of the "object upon which harmless error scrutiny can operate." *Ibid.* Yet without explanation *Kobrin* held that the erroneous instruction on materiality did precisely that. *People v. Kobrin*, 11 Cal.4th at 429.

Kobrin in effect establishes in California an "error characterization" approach to harmless error. The Ninth Circuit adopted a similar approach in *United States v. Gaudin*, 997 F.2d at 1272, *supra* (hereafter "*Gaudin I*"), reaffirmed it in *United States v. Gaudin*, 28 F.3d 943, 944 (9th Cir. 1994), (hereafter "*Gaudin II*"), and followed it in at least three more cases: *Harmon v. Marshall*, 57 F.3d 763, 765 (9th Cir. 1995); *United States v. Hove*, 52 F.3d 233, 238 (9th Cir. 1995); and *United States v. Stein*, 37 F.3d 1407, 1410 (9th Cir. 1994). Under this approach, a reviewing court must classify an instructional error as one of two types. It can be one that "removed" or "omitted" an element, or it can be one that merely

"misstated" an element, either by misdefining it or by erroneously lightening the prosecution's burden of proof through a rebuttable or conclusive presumption. If the error is of the "removed" or "omitted" type, it is either per se reversible (see *Gaudin II*, 28 F.3d at 951, *supra*; *Gaudin I*, 997 F.2d at 1272, *supra*) or, as per *Kobrin*, 11 Cal.4th at 428-429 and n. 8, *supra*, subject to a stringent harmless error test in which the error must be found prejudicial unless the jury found the element under another, proper instruction. If the error merely "misstates" an element, a reviewing court is free to decide harmlessness by examining the evidence the jury considered and the findings it made. See, e.g., *Rose v. Clark*, 478 U.S. at 580-582, *supra* [rebuttable presumption harmless if predicate facts found by the jury establish element in question]; *Pope v. Illinois*, 481 U.S. at 500-501; 503, n. 6; 504, *supra* [misdefined element would be harmless if facts found by the jury establish that the jury would have convicted absent the erroneous instruction]; *Carella v. California*, 491 U.S. at 2266-267, *supra* [conclusive presumption instruction harmless if harmless under *Rose* and *Pope*].

The error characterization approach rests upon a chimerical distinction, as this case demonstrates. The jury was told to find the "materiality" element of the offense if it found that respondent made any of the statements as charged. One could (as *Kobrin* does) characterize this instruction as one that told the jury not to consider the "materiality" element and, hence, as one that "removed" that element from the jury. But with equal validity, one could characterize the instruction as one that merely "misstated" the materiality element -- establishing a conclusive presumption that the prosecution proved materiality if it proved the other elements of the crime. Indeed, virtually any instruction that can be said to "remove" an element can with equal

validity be said merely to state a conclusive presumption. One simply characterizes as predicate facts the factual issues the jury did resolve and then adds the missing element as the conclusion in the conclusive presumption. In sum, the "error characterization" approach collapses the very distinction it purports to establish between instructions that are reversible per se because they "remove" elements and instructions that could be harmless because they merely "misstate" elements.

The Ninth Circuit has now sought to clarify its error characterization approach, recasting "omitted element" instructions as akin to misstated elements and erroneous presumptions and, hence, subject to harmless error analysis, while continuing to find so-called "removed elements" reversible per se. *Roy v. Gomez*, ___ F.3d ___; 1996 U.S. App.LEXIS 7715, 7123-7126 (9th Cir. 1996). According to *Roy*, an instruction removes an element "from the jury's purview" when it states that the element has been established as a matter of law, as the instructions did in *Gaudin* (*id.*, at 7124) and *Kobrin*. By contrast, an instruction that "omits" an element "simply fails to alert the jurors they must consider it." *Id.* at 7125. In the latter case but not the former, the jury can still "necessarily find" the element, which would render the error harmless. *Ibid.* Accordingly, an "omitted" element, like a misstated element or an erroneous presumption, is subject to harmless error analysis, whereas a removed element is not. *Ibid.* and n. 3.

Roy's approach fails first of all because, like *Kobrin* and *Gaudin*, it rests on the assumption that the essence of harmless error analysis is only what the jury actually did under the instructions it received and not also what the jury would have done under proper instructions. *Roy* bases this approach on a single sentence from Justice Scalia's concurrence in *Carella*. (*id.* at 7123, citing *Carella*, 491 U.S. at 271, Scalia, J.,

concurring [error harmless if no rational jury could find the predicate facts forming the basis for the presumption without also finding the presumed fact]. *Roy* fails to note the ambiguity in Justice Scalia's statement, takes the statement out of context, attributes a meaning to it that conflicts with this Court's other harmless error formulations, and ignores the fact that the *Carella* concurrence was only a concurrence, not the decision of this Court.

Most damningly of all, *Roy* itself undermines its "necessarily found" definition of harmless error by applying a contrary standard. In *Roy*, the jury was instructed that it could convict the defendant as an aider and abettor if it found that he knew about the principal's criminal purpose. *Roy v. Gomez*, 1996 LEXIS at 7120, *supra*. The instruction was erroneous because it failed to warn the jury not to convict without finding that the defendant also *intended* to aid the principal's criminal purpose. *Ibid.* After finding that the error could be harmless (because it merely omitted rather than removed an element) (*id.*, at 7123-7126), *Roy* decided that the error was actually prejudicial because *the evidence of* intent was insufficiently strong. *Id.* at 7127-7131. Thus, instead of deciding harmlessness by focusing solely on what the jury necessarily found, *Roy* really decided a different question without saying so: whether, given the evidence the jury considered (and, perhaps, its finding of knowledge), the jury *would have* convicted had it been properly instructed. In sum, *Roy* announced a "necessarily found" test only to abandon it in favor of a standard more akin to our jury-findings, evidence-

considered test -- a sure sign that the announced standard is at best suspect.[2/]

A test of what the jury would have found had it been properly instructed, as opposed to what it necessarily did find under the instructions it received, can be applied with equal reliability to "removed" as well as "omitted" elements. Accordingly, there is no reason to make the former type of error reversible per se and the latter possibly harmless, as the Ninth Circuit has done.

Moreover, even if one were to apply a real "necessarily found" test, there is still no reason to distinguish between the two types of error. Suppose the prosecutor charges that, though only an aider and abettor, the defendant used a gun in the commission of the crime, and the jury finds the gun use allegation to be true. In such a case, the gun use finding might be said necessarily to include within it a finding that the defendant had the requisite intent for aiding and abetting. Accordingly, it would not matter if the aiding and abetting instructions were erroneous by failing to mention intent ("omitted element") or by telling the jury that the prosecution had proved that element if it proved knowledge ("removed element").

In sum, *Roy* utterly fails to explain why mentioning an element but telling a jury not to decide it is necessarily any worse than not mentioning it at all. Because the distinction between "removed" and "omitted" elements is just as empty as the one between "removed" and "misstated" elements, *Roy* will promote the same sort of meaningless characterizations that (as *Roy* itself demonstrates) *Gaudin* and *Kobrin* have begun. Defendants will characterize instructional errors as having

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2. By asserting that *Roy* applied a standard akin to the correct one, we do not imply that it did so correctly -- i.e., that it was correct in finding the instructional error prejudicial.

prevented the jury from making a finding on an element and will use that characterization to conclude that the errors were prejudicial irrespective of the evidence the jury considered or the findings it made. The state will characterize the same errors as having merely misstated the elements in question and will use *those* characterizations to conclude that the reviewing court may look to the evidence and the jury's findings to determine harmlessness. Because the difference between the two categories is at best elusive, reviewing courts will render their decisions (as the courts did in *Kobrin*, *Gaudin I* and *II*, and *Roy*) by choosing a label rather than by analyzing the problem.

2. <u>The "Element In Mind" Notion</u>

Kobrin offered a second reason for finding its instructional error prejudicial:

> " . . . we have no basis for determining the extent to which [the jury's findings] reflect a consideration of whether defendant's false statements were material since the only reference to the [materiality] issue specifically removed it from the deliberative process. [Citations omitted.] Given the complete failure to instruct on materiality, i.e., to have the jury assess the evidence in relation to *that* element of the offense, a finding of harmless error would rest solely on conjecture, effectively substituting this court for the jury as the trier of fact." *People v. Kobrin*, 11

> Cal.4th at 429. (Emphasis in the original.)

This passage closely resembles one in *Gaudin I*. In that case, the Ninth Circuit rejected the state's contention that the jury considered overwhelming evidence of materiality in finding the other elements of the perjury:

> " . . . when an element of the crime has been completely removed from the jury's determination, there can be no inquiry into what evidence the jury considered to establish that element, because the jury was precluded from considering the element at all. The fact that evidence existed, which the jury *could have considered* [original emphasis] on the issue of materiality had the issue been submitted to the jury under an appropriate instruction, is of no moment, because the jury was instructed not to consider the evidence *as to* materiality. [Emphasis added.] Thus, simply stated under *Yates*, when an element of the crime that must be found by the jury is removed from the jury's consideration, that error cannot be harmless. [Footnote omitted.]"

In these passages, both *Kobrin* and *Gaudin* assume that a jury's failure to consider evidence *with the element in question in mind* prohibits and prevents a reviewing court from determining what the jury would have done had it been properly instructed. That assumption is flatly and demonstrably incorrect.

In *Pope*, the jury found certain material to be obscene by finding that it lacked redeeming value under a statewide standard. *Pope v. Illinois*, 481 U.S. at 499, *supra*. The jury was not instructed upon and, hence, never considered the proper issue -- whether the material lacked redeeming value under a reasonable person standard. *Id.* at 500-501. Nonetheless, this Court found that the error would be harmless if the evidence the jury considered was such that the jury would have found obscenity under a correct instruction. *Id.* at 503, n. 6; 504.

In sum, there simply is no valid "element in mind" or even "issue in mind" rule. What matters is not whether the jury properly conceptualized the findings it made or the evidence it considered but, rather, what its misconceptualized findings and the evidence it considered show about what the jury would have found had it been properly instructed.

3. The Principle That An Instructional Error Is Not Harmless If It Prevented The Defense From Adducing Substantial Evidence On The Element In Question

Finally, *Kobrin* found the instructional error prejudicial because it "may have affected the record. . . ." *People v. Kobrin*, 11 Cal.4th at 429-430, *supra*. "In refusing to instruct the jury on [materiality], the trial court concomitantly rejected the [proffered defense] evidence [on materiality] as inadmissible." *Id.* at 430.

In reaching this conclusion, the court failed to mention what the proffered defense evidence was. Accordingly, it failed to offer any guidance as to how one can determine whether an instructional error may have affected the record. This is not necessarily an easy determination to make.

Although the opinion in *Kobrin* provides no evidence of it, the California Supreme Court got it wrong. The defense had offered to show that true statements by the defendant, rather than his false ones, may have been the basis for the decision in the proceeding in question (the issuance of a temporary restraining order). The defense claimed that such a showing, if accepted by the jury, would preclude a finding that the false statements were material. The defense was incorrect. To prove materiality, the prosecution had to show only that the defendant's false statements were possibly influential in the decision, not that they were the basis for it. Accordingly, the proffered defense evidence was simply irrelevant. Likewise, by deciding the issue of materiality itself and by preventing the defense from adducing its evidence, the trial court did not affect the record in any significant way. It simply did the right thing: it excluded irrelevant evidence.

We cannot and do not ask this Court to look behind the published opinion in *Kobrin*. We have done so only to demonstrate that the meaning of the "may have affected the record" principle can be misinterpreted. It follows that by relying on but failing to explain that principle *Kobrin* offers no assurance that reviewing courts will use the principle correctly and, hence, do correct harmless analyses even in those cases in which the principle may apply.

4. Summary

Kobrin was two-thirds wrong, one-third opaque, and altogether instructive. It (like *Gaudin I* and *II*, *Roy*, and the other cited Ninth Circuit cases) demonstrates the difficulties courts face in grappling with the confusing doctrine of harmless error. An offshoot of *Kobrin*, this

case offers an instrument with which this Court can dispel the confusion.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: May 17, 1996.

Respectfully submitted,

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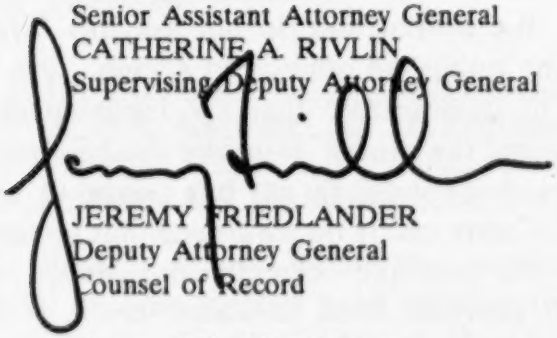

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APPENDIX A

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NOT CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

vs.

JESS RODERICK MITCHELL,

Defendant and Appellant.

H012785

(Santa Clara County Super.Ct. Nos. 164364 168432)

Defendant Jess Roderick Mitchell was charged by information with robbery (Pen. Code, §§ 211, 212.5, former subd. (b) [now subd. (c)]; count 1),[1] attempted murder (§§ 664, 187; count 2), assault with a firearm (§ 245, subd. (a)(2); count 3), auto theft (Veh. Code, § 10851; count 4), possession of stolen property (§ 496; count 5), fraudulent use of an access card with intent to defraud (§ 484g; count 6), carrying a concealed weapon in a vehicle with a prior weapons violation (§ 12025, subd. (a); count 7), two counts of carrying a loaded firearm in a vehicle (§ 12031, subd. (a); counts 8 and 9), and perjury in applying for a driver's license (§ 118;

1. Further statutory references are to the Penal Code unless otherwise indicated.

count 10). The information further alleged that defendant was armed with a firearm.

Defendant waived his right to counsel and asked the court that he be allowed to represent himself. The court initially denied defendant's request, but then granted it.

Subsequently, codefendant Calvin Russell, who had earlier pleaded not guilty, changed his plea and entered a guilty plea. Russell then testified against defendant.

The jury found defendant guilty as charged, and also found true the enhancing allegations.

The court sentenced defendant to a total term of 14 years in state prison, as follows: the upper term of 9 years for attempted second degree murder; consecutive one-third midterms of 1 year for robbery; and 8 months each for auto theft, possession of stolen property, and carrying a concealed weapon in a vehicle. Sentences for assault with a firearm and fraudulent use of access card were stayed pursuant to section 654. A one-year enhancement for the arming finding was imposed.

We affirm in part, reverse in part, and remand for resentencing.

FACTS

The June 9, 1992 Incident

Russell met defendant in Houston, Texas in 1991. Defendant had driven there in a van with several other people. Russell testified that defendant's purpose in going to Texas was to rob drug dealers, and that in one $80,000 drug dealer robbery, Russell had provided important information to defendant, although Russell did not actually go with defendant to commit the robbery.

Russell came to California in early 1992. After staying with his cousin-in-law for a couple of days, Russell moved into defendant's house in Milpitas.

Russell had been a "street hustler" in Texas since he was nine years old. Russell defined a "street hustler" as "a person that revenues or make [sic] money by the

streets," mostly "in an unlawful manner." The numerous ways that a street hustler "revenues money" include "gambling, selling drugs, stealing cars and selling them, doing robberies, pimping 'hos and all of that."

One criminal activity Russell had concentrated on was "Rolex watch robbery." Asked why, Russell explained: "It's a fast way to make money quick. It's a lot less victims being involved. It's a lot less anybody getting hurt. It's just easy. It's easy to do because it's only one thing that we are after and one person basically possesses it. [¶] So in other words, it's different than going into a store to rob a grocery store where you got a gang of people working. When you do a Rolex robbery, you just get one item and you cash it in and get paid."

Russell also explained why the best time to commit a Rolex robbery was during the day: "[F]or one reason, it's kind of hard to do a Rolex robbery at night unless you specifically know a person owns a Rolex. And two, . . . I don't believe in doing crime at night. . . . [¶] [] From the street knowledge that I have learned . . . it's easier to do work in the daytime because the police ain't going to be just really looking for you . . . in the heat of the day and it's very unexpected to everybody because the person that owns the Rolex don't even know it's coming and the police really doesn't have no idea of that type of robbery." Also, it is best to commit a Rolex robbery "when the freeways are crowded with congested traffic," "[b]ecause that's where you find the Rolex watches in the traffic. People riding, they -- some of them drive with their arms on the window like this or some have a hand on the steering wheel like this and they just easily visible from basically 20, 30 feet."

Russell testified that on the morning of June 9, 1992, he and defendant left defendant's house to commit a Rolex robbery. They drove a Ford Escort belonging to

one of defendant's friends. They picked up a third companion, Eugene Jackson (hereafter, Eugene), in East Palo Alto. As they were driving on a freeway going to San Jose, they spotted Patrick Jackson (hereafter, Jackson) driving a 1981 Mercedes Benz, wearing what appeared to be a Rolex watch. They followed Jackson, who exited I-280 at Stevens Creek and proceeded to a CompUSA store. Eugene stepped out of the Ford Escort to ascertain whether Jackson's watch was a genuine Rolex. Eugene approached Jackson and asked him for the time. Jackson looked at his watch, and in so doing exposed it to Eugene. Eugene went back to the Ford Escort and told Russell and defendant that Jackson's watch was a genuine Rolex.

Russell's group followed Jackson to Hunter Properties in Cupertino. Russell and defendant got out of their car to approach Jackson. Eugene stayed in the car. Defendant asked Jackson to give him his watch. Jackson refused, and the two fought. Russell went to Jackson, put a gun in Jackson's face, and asked Jackson: "Do you want some of this." Jackson said no, and gave up his watch. Russell asked for Jackson's wallet. As Jackson was reaching for his wallet, Regina Morella walked out of the Hunter Properties building. Morella asked what was going on. Russell told Morella to mind her own business. When Morella "said something again," Russell shot her. Morella was hit and suffered serious injuries, but did not die.

The May 13, 1992 Incident

On May 13, 1992, Dr. Jay Hann, a hand surgeon, drove his 1982 Oldsmobile Toronado to the Veterans Administration Hospital in Palo Alto. Inside the trunk of the car were valuable micro surgical instruments.

Russell testified that on that day he and defendant drove Stacy Wade, defendant's niece, in a van to the hospital so that Stacy could visit her boyfriend. While

Russell and defendant were in the hospital parking lot, they decided to steal a car. Russell looked for a car that was easiest to steal, and found Hann's Toronado. Using a screwdriver, Russell opened the Toronado's window. He then entered the car and started the engine. Russell asked defendant to drive the car because he (Russell) was "not familiar with the area," and did not know which way to go if he had "to run from the police." Defendant drove the Toronado, and Russell followed him in the van.

The September 8, 1992 Incident

On September 8, 1992, Reza Mirshafiei, who was in the business of buying and selling used cars, was driving a Lexus which he had purchased from a private party to resell. The seller had given him spare keys to the car; one key opened all doors. Mirshafiei testified that he had placed his briefcase inside the trunk of the car, and might have inadvertently left the key he used to open the trunk in the trunk lock. Inside the briefcase were Mirshafiei's checkbooks, company checks, credit cards, and business records.

Russell testified that on that day, while he and defendant were out looking for Rolex watches, he saw a Lexus with a key in the trunk lock. He told defendant, who was driving, what he saw. Russell and defendant followed the Lexus to an auto dealer's auction. Defendant went to the Lexus, opened the trunk, and took the briefcase.

Defendant suggested using the credit cards. Russell initially opposed the idea because using other people's credit cards was not one of his "hustles"; however, Russell eventually went along. Defendant, Russell, and Stephanie Crouts drove to the Zenith Wire Wheel Company (hereafter Zenith). Russell and Crouts went inside the store and ordered wheels and tires for Russell's car. They paid for the items with one of the

credit cards, but were told to pick up the merchandise later because the shop had to make an adapter for the rims.

James Craig, the owner of Zenith, was suspicious about Russell's appearance because it did not match the ethnicity suggested by the name on the credit card. Craig called a credit card security agency and the Campbell Police.

When defendant, Russell, and Crouts returned to Zenith later in the day, the police were waiting for them. The trio turned back, but were stopped by the police at Harrison Avenue. The police searched the van. Among the items found was a Glock 9mm semiautomatic handgun.

False Identity

Investigation by the police revealed that one person had applied for driver's licenses under two names: Jess Willard and Jess Mitchell. The fingerprints on the license applications matched the booking fingerprints of defendant. During his testimony, defendant admitted that the Willard application was also his, and that he submitted it to obtain a false driver's license. Defendant used the Jess Willard driver's license for identification when he purchased his handguns.

CONTENTIONS

Defendant contends:

1. The trial court erred in failing to revisit the Faretta[2] question when Russell pled guilty and agreed to testify for the prosecution.

2. The trial court committed reversible error in failing to warn defendant before he testified of his privilege against self-incrimination.

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2. Faretta v. California (1975) 422 U.S. 806.

3. The trial court erred in admitting evidence that defendant had pled guilty, and by instructing that defendant was an accomplice as a matter of law, without also instructing that defendant's guilty plea was not independent evidence that he was guilty.

4. The trial court erred in giving unmodified CALJIC No. 2.11.5, thereby minimizing an important aspect of the careful scrutiny to be given Russell's testimony.

5. The trial court erred in admitting evidence of a crime, unrelated to the current charges, which Russell claimed defendant had committed in Texas in 1991.

6. The trial court impermissibly restricted defendant's ability to impeach Russell regarding Russell's legal problems in Texas and their effect on his role as a witness for the prosecution in this case.

7. Count 6 must be reversed because the trial court failed to instruct on an essential element of the offense; if not reversed, the count 6 conviction must be reduced to a misdemeanor.

8. The trial court erred by instructing that certain statements were material as a matter of law in regard to the perjury charge in count 10.

9. Because the amount of the restitution fine is not supported by the record, the case must be remanded for a hearing on the issue, or the fine must be reduced to the statutory minimum.

DISCUSSION

No Error in Failure to Revisit Faretta Question

Defendant contends the trial court erred in failing to revisit the Faretta question when codefendant Russell pled guilty and agreed to testify for the prosecution. We disagree.

Approximately one month after defendant had elected to represent himself, Russell, who was represented by the public defender, pled guilty and

agreed to testify for the prosecution. Defendant claims that Russell's decision to plead guilty and testify for the prosecution constituted a "drastic increase in the risks of self-representation for defendant," and hence the trial court "should have inquired of Mr. Mitchell whether he wanted to reconsider his decision to represent himself under these new and eminently more hazardous circumstances."

Defendant cites no authority for the proposition that increase in the risks of self-representation is a ground to revisit the Faretta question. We think the proposition is unacceptable. Were we to accept the proposition, the question would be revisited each time a pro se defendant would make a mistake that would substantially increase the probability of his or her conviction. As this could happen innumerable times over the entire course of a criminal proceeding, revisiting the question as often would impose on the court a requirement that serves no constitutional or useful purpose.

In People v. Poplawski (1994) 25 Cal.App.4th 881, 889, this court held that the Faretta election of self-representation is valid and binding on a defendant for the rest of the proceedings if made competently, knowingly, intelligently, and voluntarily. We stated that "the only valid reasons for revoking a defendant's pro se status are disruptive in-court conduct or substantial evidence of incompetency." (Ibid.) None of the excepted situations is present here.

Defendant relies on language in U.S. v. Fazzini (7th Cir. 1989) 871 F.2d 635, 643 (hereafter, Fazzini), which states: "Once the defendant has knowingly and intelligently waived his right to counsel, only a substantial change in circumstances will require the district court to inquire whether the defendant wishes to revoke his earlier waiver." Defendant argues that "[a] more substantial change in circumstances than that which befell

Mr. Mitchell in this case is difficult to imagine." The reliance is misplaced.

First, Fazzini in fact rejected the "substantial change" argument in that case. Second, Fazzini is factually distinguishable. In Fazzini, the defendant disputed that he ever waived his right to counsel. Indeed, the Fazzini court noted that "the record shows that the defendant never clearly stated that he waived his right to counsel. Instead, on several occasions, the defendant insisted that he was being forced to proceed pro se by the court and would have preferred to have new counsel appointed." (871 F.2d at p. 642.) Nevertheless, stating that "it is not necessary that a defendant verbally waive his right to counsel," the Fazzini court found that the defendant's actions in that case had the "effect of depriving himself of appointed counsel" and "establish[ing] a knowing and intentional choice." (Ibid.) Because the defendant had implicitly waived his right to counsel, Fazzini held that the court was not required to inquire of the defendant if he wanted to be represented by counsel at sentencing. (Ibid.) It was in the context of rejecting the defendant's claim that "it is incumbent upon the judge to ensure that at each critical phase of the proceedings, the defendant is asked whether he wishes to continue without counsel," that the court stated that "[o]nce the defendant has knowingly and intelligently waived his right to counsel, only a substantial change in circumstances will require the district court to inquire whether the defendant wishes to revoke his earlier waiver." (Id. at p. 643.)

It is thus plain that the weight of the evidence against the defendant or the complexity of the issues is a not factor to consider in granting or denying a defendant's Faretta requires of self-representation. All that is required is that the defendant "'knowingly and intelligently'" waive his or her right to counsel. (Faretta v. California, supra, 422 U.S. at p. 835.) As stated in

Faretta: "We need make no assessment of how well or poorly Faretta had mastered the intricacies of the hearsay rule and the California code provisions that govern challenges of potential jurors on voir dire. For his technical knowledge, as such, was not relevant to an assessment of his knowing exercise of the right to defend himself." (Id. at p. 836, fn. omitted.)

We conclude the trial court did not err in failing to revisit the Faretta question after Russell's change of plea and agreement to testify for the prosecution.

No Failure to Warn Against Self-incrimination

Defendant contends the trial court committed reversible error in failing to warn him before he testified of his right against self-incrimination. The contention is without merit.

The transcript of the Faretta hearing reveals that the trial court repeatedly advised defendant in the strongest terms possible against self-representation, warning him that he would be up against an experienced prosecutor who would be determined to convict him. Further, the court specifically advised defendant that he had a right to remain silent and to not testify; that if he testified, he waived all immunity and his privilege against self-incrimination, and hence could be cross-examined, and anything he might say could be used against him.

The following colloquy demonstrates the sufficiency of the trial court's advice and warning: "THE COURT: Now, Mr. Mitchell, it's one thing to be an intelligent person and have verbal skills. The woods are full of those people. But to step into here, it would be like me, for example, putting the pads on you and say go up and play wide receivers for the 49er's, not knowing the play book, not having worked out, not being in shape and go out there over the middle, I want you to catch a pass. I want to tell you Lawrence Taylor is there waiting for you. This is what Mr. Hood [the prosecutor] is. He's

Lawrence Taylor waiting over the middle for you to come across and catch the ball. His interest is to put your lights out, legally speaking. [¶] Now, if you want to jump into that mess, you can do it, it's your call. But you've never been down this path before. Watching it on television, talking to other people and saying to yourself, if I'm going to fall, I'm going to do it the hard way. I'm going to represent myself. I'm going to try to make every motion I can. I'm going to try to make a record for appellate purposes so that when it's appealed, it's reversed. That's kind of throwing in the towel. That's saying, I know I'm going to be convicted, but I hope it gets reversed two or three years later. That's a big gamble. . . . [¶] Now, have you had -- in your college courses, have you taken classes, for example, in public speaking or business law or anything like that?

"DEFENDANT MITCHELL: No, sir. I was an electrical engineer.

"THE COURT: All right. Well, then, you should be familiar then with the term 'force is mass times acceleration.' And the force with which you get hit in this case is going to be a big mass at high speed. That's going to be the D.A.'s case with his experience. [¶] Now, I can't protect you on objections. I can't protect you when you ask a question, he objects, and you don't know how to ask a question. I can simply sustain it. I can't give you direction how to ask the question. that's one of the most difficult things for persons who represent themselves to do. How to ask a witness a question so that they can get the truth out of it and not testify as they want to. Coupled with the fact if you do testify, anything you say can or will be used against you. You don't have to be forced to testify. You have the right to remain silent."

Later in the Faretta hearing, after defendant had insisted on self-representation despite the court's advice

to the contrary, the court called codefendant Russell and his counsel, and discussion abut the potential consequences in the event defendant decided to testify ensued: "MS. BERNADINI [Russell's counsel]: Your Honor, you also might imagine what would happen if Mr. Mitchell wanted to testify. If Mr. Mitchell choose [sic] to testify and overlapping evidence is presented by the District Attorney, he can be cross-examined on a case which he is represented by Mr. Furst --

"THE COURT: Right.

"MS. BERNADINI: -- where the evidence is the same.

"THE COURT: And I'm sure Mr. Furst would say to him, I advise you not to testify and refuse to answer those questions. Once he takes the stand and says anything to anybody on direct, he waives all immunity and waives his privilege against self-incrimination. [¶] [] Mr. Mitchell, let me ask you one or two questions. Do you intend to go forward with your case in municipal court, attempted murder charge, and represent yourself on that case? You see what the problem is, Jess?

"DEFENDANT MITCHELL: I see it, yes, sir."

On this record, we are persuaded the trial court adequately advised defendant of his right against self-incrimination prior to defendant's taking the witness stand, and that defendant took the witness stand knowing that by doing so he was waiving his privilege against self-incrimination.

No Error in Admitting Evidence That Codefendant had Pled Guilty

Defendant contends the trial court erred in admitting evidence that Russell had pled guilty and instructing that Russell was an accomplice as a matter of law, without also instructing that Russell's guilty plea was not independent evidence that defendant was guilty. The contention is without merit.

The rule is settled that "[a] trial court is required to instruct sua sponte only on those general principles of law that are closely and openly connected with the facts before the court and necessary for the jury's understanding of the case. [Citation.]" (People v. Price (1991) 1 Cal.4th 324, 442.) The issue of the limited admissibility of evidence is not such a general principle of law. In People v. Collie (1981) 30 Cal.3d 43, 63, the court stated: "Although the trial court may in an appropriate case instruct sua sponte on the limited admissibility of evidence of past criminal conduct, we have consistently held that it is under no duty to do so. [Citations.]"

The fact that a defendant is pro se does not alter the rule. "The general rule is that a self-represented defendant is not entitled to any assistance or advice from the trial judge on matters of law, evidence or trial practice. [Citations.]" (People v. Jones (1992) 2 Cal.App.4th 867, 873.)

Here, defendant did not object when Russell testified that he (Russell) had pleaded guilty to the same crimes that were also charged against defendant. Likewise, defendant did not request a limiting instruction that would have informed the jury that Russell's guilty plea was not independent evidence of defendant's guilt.

We hold that defendant's failure to object and to request a limiting instruction waived the issue and precludes defendant from raising it for the first time on appeal.

Any Error in Giving CALJIC No. 2.11.5 is Waived

Defendant contends the trial court erred in giving unmodified CALJIC No. 2.11.5, which instructed the jury that it should not discuss or consider the reasons why a person other than the defendant was not being prosecuted. While conceding that the instruction was proper as applied to Eugene, defendant argues it was

erroneous as applied to Russell because its effect was to direct the jury that it could not consider Russell's plea bargain in evaluating Russell's credibility. We disagree.

In People v. Sully (1991) 53 Cal.3d 1195, 1218, where it was contended that CALJIC No. 2.11.1, although properly given based on the evidence, was too general to the extent it could be viewed as applying to the appellant, who was a prosecution witness, but where no request was made for a limiting instruction, the court, in holding that appellant had waived any assignment of error, stated: "'A party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language.'" (Citation omitted.)

Here, since defendant did not request an appropriate limiting instruction below, he is therefore precluded from claiming error on appeal. Again, "a self-represented defendant is not entitled to any assistance or advice from the trial judge on matters of law, evidence or trial practice. [Citations.]" (People v. Jones, supra, 2 Cal.App.4th at p. 873.)

No Error in Admitting Evidence of Texas Crimes

We also reject, for lack of merit, defendant's contention that the trial court erred in admitting evidence of a crime unrelated to the current charges which Russell claimed defendant had committed in Texas in 1991.

During his examination in chief, Russell testified that he first met defendant in Houston, Texas when defendant, in the company of other persons, was there for a visit. Apart from asking Russell when and where he first met defendant, with whom defendant was with, and how defendant came to Texas, the prosecutor did not ask Russell anything else about defendant's contacts or activities in Texas.

On cross-examination, defendant attempted to impeach Russell's credibility by showing that Russell had earlier made inconsistent statements to police investigators about their meeting in Houston. Defendant asked Russell whether they had in fact met in Houston, whether Russell had told investigators it was in 1992 rather than in 1991 when they first met, and whether Russell had told the investigators that defendant and his companions had flown, rather than driven, to Houston. Defendant also challenged Russell's claim that defendant's purpose in coming to California was to commit drug-dealer robberies with defendant.

Before redirect examination, the prosecutor argued to the court that defendant had "opened the door" to examination about "drug rip-offs," including whether defendant's purpose in going to Texas was to rob drug dealers. The trial court agreed the subject area had been opened up through defendant's questions about Texas, drug-dealer robberies, when defendant went to Texas and with whom, when he first met Russell, and why Russell came to California. When defendant argued he was only asking Russell to explain inconsistencies in Russell's testimony and statements, the court told him the questioning had not been narrow: "[Y]ou conducted a lot of examination concerning that type of an issue, what was going on in Texas, why you were there, what you did there, how long you stayed there, when you came back to California, when Mr. Russell came to California, why he came to California, who he stayed with, what he did, did he work, did you work, et cetera."

On redirect examination, Russell testified, without objection from defendant, that defendant and his companions had come to Texas to rob drug dealers because Texas drug dealers were less wary of robbery and did not secure their money as carefully. Russell

further testified that he had set up two drug dealers for robbery by defendant.

Pursuant to Evidence Code section 353, subdivision (a), a judgment may not be set aside on grounds of erroneous admission of evidence unless there appears of record a timely objection "so stated as to make clear the specific ground of the objection . . . ." Here, defendant's objection was only that the matter of drug-dealer robberies was beyond the scope of his cross-examination; there was no objection on Evidence Code section 352 or 1101 grounds. Accordingly, objections on those grounds were waived.

"It is well settled that when a witness is questioned on cross-examination as to matters relevant to the subject of the direct examination but not elicited on the examination, he may be examined on redirect as to such new matter." (People v. Kynette (1940) 15 Cal.2d 731, 752.) "Upon redirect examination it is proper to permit the witness to state facts and circumstances that tend to correct or repel any wrong impressions or inferences that might arise on matters drawn out on cross-examination." (Myers v. Rose (1938) 27 Cal.App.2d 87, 89.) "A trial court's exercise of discretion will not be disturbed unless it appears that the resulting injury is sufficiently grave to manifest a miscarriage of justice. [Citation.] In other words, discretion is abused only if the court exceeds the bounds of reason, all of the circumstances being considered. [Citation.]" (People v. Stewart (1985) 171 Cal.App.3d 59, 65.)

On this record, we conclude the trial court did not abuse its discretion in admitting, during redirect examination, without objection from defendant, evidence of a crime unrelated to the current charges which Russell claimed defendant had committed in Texas in 1991.

No Denial of Right of Confrontation

Defendant contends the trial court denied him his Sixth Amendment right of confrontation and cross-examination, and due process, by precluding him from inquiring "whether Mr. Russell hoped to gain from his testimony in this case any benefit in regard to matters pending against him in Texas." The contention is without merit.

Before Russell took the witness stand, the prosecutor informed the court outside the presence of the jury that "at one point . . . there was a request to extradite Mr. Russell out of Texas for a murder"; that the extradition request was no longer pending; and that he did not believe Russell had been convicted of murder in Texas. The prosecutor then moved to exclude any reference to Russell "as a suspect in a murder or him being extradited for murder or charged with murder or anything along those lines out of Texas in this case."

The following colloquy ensued: "MR. MITCHELL: In other words, that's saying I can't ask him has he ever committed similar crimes to this before?

"THE COURT: Well, that you can't ask in any event unless you have evidence to present to establish that conduct. Again, if he does testify, you have the right to offer evidence that would impeach his credibility. . . . And if Mr. Hood does not bring those out on direct, you can certainly bring those out on cross-examination because the relevance bears upon credibility.

". . . . . .

"MR. MITCHELL: I just have one question then. Maybe you can direct to Mr. Hood then and we could answer this and then I wouldn't have any other reason to bring it up. Was any deal made with Mr. Russell pertaining to that Texas extradition situation.

"THE COURT: That's a very good point.

"MR. MITCHELL: Concerning --

"THE COURT: I understand exactly what you are saying. That's a very good point. If, in fact, there has been some assistance provided by the People in this particular case with respect to your pending matter in Texas and that's part of the motivation as to why Mr. Russell is testifying, then you could certainly go into it, if that be the case.

"MR. MITCHELL: That's why I am asking now, sir, to find out.

"THE COURT: Yes, that's a reasonable request because you do have a right to attempt to impeach credibility and to show a prejudice or bias or motivation as to why somebody is testifying. And if there was some type of arrangement made with respect to that by the People in this case, it certainly would be relevant."

Further down the colloquy, the exchange continued: "THE COURT: . . . In the absence of some evidence that you might have, Mr. Mitchell, that the People in this case suggested to Mr. Russell in some fashion that they would assist him on his matters in Texas, whether it be the present extradition matter for violation of parole or whether it be this other matter where apparently there was a murder charge pending, in the absence of some evidence, did that play in his motivation to testify, I would rule that it's all legally inadmissible. [¶] If there is evidence that that was discussed and considered and formed a basis or the part of the basis for Mr. Russell to testify in this case, then it certainly would be admissible because it was relevant to show a motivation as to why he is testifying, to wit, he is trying to help himself on his pending matters in Texas and in exchange for that help, he is testifying in the fashion he is testifying in. [¶] But again, based on the representations made by the People and based upon the agreement they claim you have, there's apparently been no discussion of any whatsoever of any type involving the Texas matters.

"MR. MITCHELL: I would still be concerned that it appears to be suspicious that suddenly Mr. Russell wouldn't be charged with murder in another jurisdiction and he would suddenly become a witness in Santa Clara County.

"THE COURT: I can't answer that for you and I don't know anything about the Texas matters. I don't know anything about the Texas charge or why it was filed or why it was withdrawn. None of that is before the court. [¶] I am simply saying in the absence of any evidence that that played a factor in his deciding to testify, it's all irrelevant. If it did play a factor and it was suggested to him that perhaps the People could help him on those Texas matters, et cetera, then of course it would be relevant and you could examine him about it.

. . .

". . . . . .

"MR. MITCHELL: One other area that I want to cover about that is I didn't see in here any -- anything about in the agreement about Mr. Russell's extradition to Texas for his probation violation. And I was just curious as to whether or not that was going to be something that would be done as a part of his deal with them, that he would go to Texas to serve his time that he's been offered here.

"THE COURT: If you feel that that's part of his motivation, that he wants to go to Texas to serve his time on this charge, you can ask him that question.

"MR. MITCHELL: Thank you, sir.

"THE COURT: If you feel that he is testifying in the fashion he is because he simply wants to get out of California and go to Texas and this is the fastest way he can do it and he is receiving assistance in that respect, you can ask him.

"MR. MITCHELL: Thank you, sir."

Clearly, on this record, there was no violation of defendant's right of confrontation and cross-examination, and due process. The court did not preclude defendant from cross-examining Russell on his motivation for changing his plea and testifying for the prosecution. Specifically, the court did not preclude defendant from asking Russell if Russell stood to benefit from testifying as he did.

The cross-examination restrictions imposed by the court did not amount to abuse of discretion. As stated in Delaware v. Van Arsdall (1986) 475 U.S. 673, 679: "It does not follow . . . that the Confrontation Clause of the Sixth Amendment prevents a trial judge from imposing any limits on defense counsel's inquiry into the potential bias of a prosecution witness. On the contrary, trial judges retain wide latitude insofar as the Confrontation Clause in concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant. . . . '[T]he Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.' [Citation.]"

No Error in Credit Card Fraud Instructions

Defendant contends count 6 must be reversed because the trial court failed to instruct that an essential element of the charged crime was that the credit card must have been stolen. We disagree.

At the time of the commission of the crime charged in count 6, section 484g provided: "Every person, who with intent to defraud, (a) uses for the purpose of obtaining money, goods, services or anything else of value an access card obtained or retained in violation of Section 484e or an access card which he or she knows is

forged, expired, or revoked, or (b) obtains money, goods, services or anything else of value by representing without the consent of the cardholder that he or she is the holder of an access card or by representing that he or she is the holder of an access card and the card has not in fact been issued, is guilty of theft. If the value of all money, goods, services and other things of value obtained in violation of this section exceeds four hundred dollars ($400) in any consecutive six-month period, then the same shall constitute grand theft." (See Stats. 1986, ch. 1436, § 4.)

As should be noted, section 484g does not require proof that the credit card was stolen. All it requires is that the card was "obtained or retained in violation of Section 484e," and thereafter used with the knowledge that it was so obtained or retained. Section 484e, subdivision (a), on the other hand, provides that "[e]very person who acquires an access card from another without the cardholder's or issuer's consent or who, with knowledge that it has been so acquired, acquires the access card, with intent to use it or to sell or transfer it to a person other than the issuer or the cardholder is guilty of petty theft." Subdivision (c) of section 484e further provides that "[e]very person who sells, transfers, conveys, or receives an access card with the intent to defraud, or who acquires an access card with the intent to use it fraudulently, is guilty of grand theft."

The trial court's instruction to the jury read: "In order to prove this crime, each of the following elements must be proved: One, a person used an access card for the purpose of obtaining money, goods, services or anything else of value. Two, the person used the access card by representing without consent that he was the holder of the access card. And three, at the time of such use, the person had the specific intent to defraud."

Clearly, the instruction satisfied the elements of section 484g. Accordingly, there was no error.

We agree with defendant, however, that the count 6 conviction should be reduced from a felony to a misdemeanor. Section 484g plainly provides that a violation of that section is theft unless the value of all money, goods, services, and other things of value obtained exceeds $400 in any consecutive six-month period, in which case, the crime is grand theft.

Here, the wheels and tires which were ordered, and which had a retail value of $2,600, were never in fact delivered; they were not therefore "obtained" within the meaning of section 484g. As to the items that were actually purchased with the card, no evidence was presented to show that their combined value exceeded $400.

Respondent contends that the provision in section 484g defining as grand theft the obtaining of money, goods, services, et cetera, worth in excess of $400 is not the exclusive but only an alternative means of establishing grand theft. In support of this contention, respondent claims that because acquiring an access card with intent to defraud is already grand theft under section 484e, subdivision (c), use of a card so acquired cannot be less.

The flaw in this argument is that while section 484e is a means to commit a violation of section 484g, a violation of section 484e is a separate crime in itself. Hence, had defendant been separately charged with a violation of section 484e, subdivision (c), a conviction thereunder would have been grand theft, his misdemeanor conviction under section 484g would have been in addition thereto. But because defendant was not so separately charged, the People cannot here bootstrap the penalty for the greater crime not charged to the lesser crime that was charged.

Moreover, in construing criminal statutes, "[i]f the statutory language is ambiguous and susceptible to two plausible interpretations, we must, because this is a criminal statute, adopt the one more favorable to the defendant. [Citation.]" (People v. Bransford (1994) 8 Cal.4th 885, 895 (conc. and dis. opn. of Kennard, J.).)

Accordingly, on count 6, we must remand for resentencing.

Materiality a Jury Question

Defendant contends the trial court erred in instructing the jury with respect to count 10 that certain allegedly false statements in defendant's application for a California driver's license were material matters within the meaning of the elements of the crime of perjury, because such instruction removed the question of materiality from the jury. We agree.

In People v. Jimenez (1992) 11 Cal.App.4th 1611, 1622, this court, relying on People v. Lem You (1893) 97 Cal. 224, 228 (hereafter, Lem You), held that the issue of materiality in a perjury prosecution "is a question 'of law for the court, and not of fact for the jury.'" Although we were critical of that rule, noting that the continuing validity of that proposition has been put to question in light of modern due process requirements, we felt bound to apply it until Lem You was reversed. (11 Cal.App.4th at pp. 1622-1623.)

Recently, in People v. Kobrin (1995) 11 Cal.4th 416, 427, footnote 7, the Supreme Court, citing the recent opinion of the United States Supreme Court in U.S. v. Gaudin (1995) 515 U.S. ___ [115 S.Ct. 2310], expressly overruled Lem You. the Kobrin court held that (1) "'materiality' constitutes an element of the crime of perjury" (11 Cal.4th at p. 426); (2) the due process clause requires that the jury determine the question of materiality in a perjury prosecution (id. at pp. 423-424); and (3) the failure of the court to instruct the jury on

materiality requires reversal per se because "it infects the structural integrity of the trial process" (id. at p. 428). Gaudin had held that materiality in a prosecution under 18 United States Code section 1001, which prohibits making false statements or representations of material fact to a federal department or agency, is a question of fact for the jury. (U.S. v. Gaudin, supra, 115 S.Ct. at p. 2314.)

Because the removal of the materiality issue from the jury is reversible per se, the trial court's error is incurable by harmless error analysis. (People v. Kobrin, supra, 11 Cal.4th at pp. 428-430.)

No Error in Imposing Restitution Fine of $5,000

Defendant contends the restitution fine of $5,000 must be reduced to the minimum of $200, or the case be remanded for a determination of his ability to pay. We disagree.

Although present law no longer requires a finding of ability to pay, this case is governed by former Government code section 13967, subdivision (a), which provided in pertinent part that "if the person is convicted of one or more felony offenses, the court shall impose a . . . restitution fine of not less than two hundred dollars ($200), subject to the defendant's ability to pay, and not more than ten thousand dollars ($10,000)." (See Stats. 1992, ch. 682, § 4.)

There was no requirement under former Government Code section 13967, subdivision (a), that the trial court make an express determination on the record of a defendant's ability to pay. (People v. Frye (1994) 21 Cal.App.4th 1483, 1485-1486.) Defendant's ability to pay could be implied from the record. (Ibid.) Further, the court was "not limited to considering a defendant's present ability but may consider a defendant's ability to pay in the future." (Id. at p. 1487.) The court could consider that as a prison inmate defendant would be

compensated for performing work assigned to him. (Ibid.) On appeal, the trial court's finding of ability to pay will be upheld if supported by the record. (People v. Staley (1992) 10 Cal.App.4th 782, 785-786.)

Here, the court explicitly found defendant had ability to pay. At the sentencing hearing on June 16, 1994, the court stated: "With respect to the restitution fund fine, I do find you have an ability to pay. I do find that there is no question but that you will be involved in a work program in the Department of Corrections . . . . I know from your own statements and from the probation report and from the evidence that you are able-bodied, that you can work. You were physically fit per your own statements repeatedly; you keep yourself in condition. You don't abuse drugs or alcohol. You take care of yourself physically, so you certainly are able to work. You will work, I assume, and if you do work you will receive monies. Out of those monies the Department of Corrections will take an appropriate portion to pay to the restitution fund fine."

The trial court's finding of defendant's ability to pay is supported by the record. The fact alone that defendant's total term of imprisonment is 14 years indicates that defendant has that much time to work in prison to earn the $5,000 restitution fine. Accordingly, we find no abuse of discretion.

DISPOSITION

The judgment of conviction on count 10 is reversed. In all other respects, the judgment is affirmed. This matter is remanded to the superior court for resentencing on count 6 in the manner indicated in this opinion.

Premo, Acting P.J.

WE CONCUR:

Elia, J.

Mihara, J.

PEOPLE v. MITCHELL
No. H012785

APPENDIX B

APPENDIX B

Sixth Appellate District No. H012785
S051386

IN THE SUPREME COURT OF CALIFORNIA

SUPREME COURT
FILED
MAR 27 1996
Robert Wandruff Clerk
Deputy

THE PEOPLE, Respondent

v.

JESS RODERICK MITCHELL, Appellant

Petitions for review DENIED.

LUCAS

Chief Justice

RESPONSE REQUESTED
ORIGINAL
ORIGINAL
Supreme Court, U.S.
FILED
SEP 16 1996
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NO. 95-1882

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

CALIFORNIA, Petitioner

vs.

JESS RODERICK MITCHELL, Respondent

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

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NO. 95-1882

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

CALIFORNIA, Petitioner

vs.

JESS RODERICK MITCHELL, Respondent

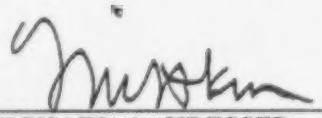
MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Respondent, Jess Roderick Mitchell, asks leave to file a brief in opposition to petition for a writ of certiorari without prepayment of costs and to proceed in forma pauperis. The brief was sent to this court from the office of associate counsel Renee Torres. Respondent was declared indigent in both the California Superior Court and the California Court of Appeal, Sixth Appellate District, and counsel was appointed to represent him in both courts. Petitioner's affidavit in support of the motion is not attached hereto, for the reasons set forth below.

An affidavit in support of motion for leave to proceed in forma pauperis was sent from counsel to respondent, who is incarcerated at Pleasant Valley State Prison, in Coalinga, California. Due to various problems in getting respondent's signature notarized in the institution,

the document was not notarized and mailed until today's date, September 11, according to respondent's prison counselor. Upon receipt, I will tender the affidavit to the court, with a proof of service on opposing counsel.

Dated: September 11, 1996



MICHAEL A. KRESSER
Counsel for Respondent,
JESS RODERICK MITCHELL

PROOF OF SERVICE

I declare that I am over the age of 18, not a party to this action and my business address is 100 N. Winchester Blvd., Suite 310, Santa Clara, California 95050. On the date shown below, I served the within MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS to the following parties hereinafter named by:

__ Causing a true copy thereof to be delivered to the office of each party shown below at the address indicated by leaving the same with a person apparently in charge and over the age of 18 years.

X Placing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Santa Clara, California, addressed as follows:

Jeremy Friedlander
Deputy Attorney General
Attorney General's Office
50 Fremont Street
Suite 300
San Francisco, CA 94105-2239

I declare under penalty of perjury the foregoing is true and correct. Executed this 11th day of September, 1996, at Santa Clara, California.

Sue Yarbrough

No. 95-1882

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

CALIFORNIA, Petitioner

v.

JESS RODERICK MITCHELL, Respondent

Petition for Writ of Certiorari to the
California Court of Appeal for the Sixth Appellate District

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APPENDICES TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Documents filed in the California Court of Appeal, Sixth Appellate District, in *People* v. *Mitchell*, H018725

Appx. A — Excerpt of Appellant's Opening Brief (pp. 55-57, 52-53), dated March 12, 1995

Appx. B — Excerpt of the State's Respondent's Brief (pp. 47, 44-46), dated May 24, 1995

Appx. C — Court of Appeal notice, setting oral argument for October 3, 1995

Documents filed in the California Supreme Court in *People* v. *Kobrin*, S036656

Appx. D — Letter from the California Supreme Court to counsel, dated June 20, 1995, soliciting supplemental briefs

Appx. E — Excerpt from the State's Respondent's Supplemental Brief on the Merits (pp. 1-3, 12), filed July 5, 1995

Appx. F — Excerpt from Kobrin's Second Supplemental Brief on the Merits (pp. 14-18), filed July 12, 1995

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No. 95-1882

IN THE

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OCTOBER TERM, 1995

CALIFORNIA, Petitioner

v.

JESS RODERICK MITCHELL, Respondent

Petition for Writ of Certiorari to the
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BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the California Court of Appeal for the Sixth Appellate District in *People v. Mitchell*, H012785, is unpublished. It is reproduced in Petitioner's Appendix A at pages 1 through 26. The portion of the opinion relevant to the question presented is at pages 23 and 24.

JURISDICTION

The Court of Appeal's opinion, affirming all of respondent's convictions save for his conviction of perjury, was filed December 19, 1995. No petition for rehearing was filed in that court. A petition for review in the California Supreme Court was denied on March 27, 1996. Pet. Appx. B. Petitioner has invoked this Court's jurisdiction under 28 U.S.C. § 1257(a). However, for the reasons discussed in Part I, *infra*, respondent submits that this Court lacks jurisdiction because petitioner did not present its harmless error theory to the tribunal that actually decided the case, the California Court of Appeal for the Sixth District. Alternatively, on the same ground, this Court should decline to exercise jurisdiction for prudential reasons.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Article III, Section 2:

"The trial of all crimes, except in cases of impeachment, shall be by jury."

United States Constitution, Amendment 5: "No person shall be ... deprived of life, liberty, or property without due process of law...."

United States Constitution, Amendment 6: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury...."

United States Constitution, Amendment 14: "No state shall . . . deprive any person of life, liberty, or property, without due process of law...."

California Constitution, Article I, section 16: " Trial by jury is an inviolate right and shall be secured to all...."

California Constitution, Article VI, section 13: "No judgment shall be set aside, or new trial granted, in any cause, on the ground of misdirection of the jury, ... unless ... the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

California Penal Code, section 118: "Every person who. . . testifies, declares, deposes, or certifies under penalty of perjury in any of the cases in which the testimony, declarations, depositions, or certification is permitted by law of the State of California under penalty of perjury and willfully states as true any material matter which he or she knows to be false, is guilty of perjury." Cal. Pen. Code § 118 (West. 1996).

California Rules of Court, Rule 29: "Grounds for Review in Supreme Court. . . . (b) [Limitations] As a matter of policy, on petition for review the Supreme Court normally will not consider: (1) any issue that could have been but was not timely raised in the briefs filed in the Court of Appeal; (2) any issue or any material fact that was omitted from or misstated in the opinion of the Court of Appeal, unless the omission or misstatement was called to the attention of the Court of Appeal in a petition for rehearing." Cal. Rules of Court, rule 29(b) (West. 1996).

STATEMENT OF THE CASE[1]

Respondent was charged in a ten-count information with robbery, attempted murder, assault with a firearm, auto theft, possession of stolen property, fraudulent use

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[1] Respondent only briefly summarizes the salient procedural and historical facts above. For a more detailed account, see the Court of Appeal's rendition. See Pet. Appx. A at pages 2 through 6.

of an access card, carrying a loaded and concealed firearm in a car, and perjury in applying for a driver's license. He represented himself at trial and was convicted by a jury of all counts. He was sentenced to a total term of 14 years in state prison. According to the Court of Appeal's opinion, he was not sentenced on the perjury conviction. See Pet. App. A, p. 2. On appeal, respondent's perjury conviction was reversed; his conviction for fraudulent use of a credit card was reduced to a misdemeanor; the matter was remanded for redetermination of restitution; and the judgment was otherwise affirmed in toto.

On September 8, 1992, respondent and a confederate, who had previously successfully stolen a car together, followed a Lexus to an auto dealer's auction lot. They stole a briefcase from the trunk of the car. The briefcase contained credit cards, which they used to buy wheels and tires for the confederate's car. When they returned to the store to pick up their merchandise, the police were waiting for them. Inside the van in which respondent was apprehended, the police found a semiautomatic handgun.

Incidentally, the police discovered that respondent had applied for two California driver's licenses under different names. Fingerprint evidence linked respondent to both license applications. At trial, respondent admitted that he had permitted a credit agency, which was helping him with his credit problems, to apply for a driver's license for him under a different name, and had provided that company with the information which appeared on the driver's license application, but he denied filling out the application or signing it. When he went to DMV he was told to "sign [his] name as such-and-such, Jess Willard, and take a thumbprint, do the picture, and things to that effect," which he did.

The jury was instructed that if it found respondent made certain statements, those statements were material, as matter of law.[2]

On appeal to the Sixth Appellate District, respondent argued that the trial court should have permitted the jury to decide the question of materiality instead of informing them that materiality had been decided by the court against respondent, and that the error was reversible per se. See Appx. A (attached). Petitioner responded only that

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[2] The court instructed the jury as follows:

> " . . . Count ten alleges a violation of the California Penal Code section 118, perjury, defined as follows: every person who declares on any driver's license application under penalty of perjury and willfully states as true any *material matter* [emphasis added] which is false and which such person knows to be false is guilty of the crime of perjury in violation of section 118 of the California Penal Code.
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> "In order to prove this crime, each of the following elements must be proved: one, a person declared under the penalty of perjury that the driver's license application was true and correct with knowledge that the statement was made under penalty of perjury. Two, the declaration under penalty of perjury was committed [sic: "permitted"] by law. Three, such person declared as true a matter which was false and which such person knew was false. And four, such person had the specific intent to declare falsely under penalty of perjury.
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> "It is alleged that the defendant made the following false statement in this case. That he had never before had a California's driver's license, that he had not applied for a California driver's license under a former or a different name within the past five years[,] and that he gave a false name. *If you find that the defendant made one or more of the statements as charged, such statements were material matters within the definition of perjury . . . .*" [Emphasis added]. Cert. Pet. pp. 5-6.

under California law, there was not error. See Appx. B (attached). Thereafter the Court of Appeal filed its opinion holding that the instruction was error and reversible per se, based on *People* v. *Kobrin*, 11 Cal.4th 416; 45 Cal.Rptr.2d 895; 903 P.2d 1027 (1995), which had been decided by the California Supreme Court after briefing and oral argument in *Mitchell* were complete. No petition for rehearing was filed. A petition for review in the Supreme Court was denied and this petition follows.

REASONS FOR DENYING THE WRIT

The State of California hopes to persuade this Court to issue a writ of certiorari to an intermediate appellate court on an issue which the Attorney General never contested before that court; on a theory of harmless error which is inconsistent with this Court's opinions and was exhaustively litigated in, and rejected by, the California Supreme Court *People v. Kobrin, supra*, where the Attorney General declined to seek certiorari; and in a case in which respondent's liability for perjury was almost meaningless in the grand scheme of things. Thus, even assuming the time has come for this Court to "correct basic, widespread errors" (Cert. Pet. p. 15) in appellate courts' harmless error review, this is manifestly not the case in which to attempt such a task. For there are at least four good reasons why this court should deny the writ.

First, the State has not properly preserved the issue it wishes this court to resolve, because in the California Court of Appeal petitioner never argued that the error in this case was harmless. Second, the *Kobrin* opinion -- which is the true target of petitioner's wrath, and on which the intermediate court below exclusively relied -- rests as much on independent state grounds as on federal notions of harmlessness. Third, as a matter of

federal jurisprudence, it has been clear at least since *Carpenters v. United States*, 330 U.S. 395, 408-409 (1947), that directed verdicts against a criminal defendant are simply incompatible with the Constitution, no matter how overwhelming the evidence of the defendant's guilt, and the court's instruction here was nothing less than a directed verdict on an element of the offense of perjury. Finally, because this is a case of a directed verdict, it is a poor vehicle indeed for providing reviewing courts with guidance on (1) an instruction which omits an element of the offense, or (2) conflicting instructions which may withdraw an element of the offense from the jury's consideration, or (3) an instruction which obscures "only an aspect of an element." *People v. Cummings*, 4 Cal.4th 1233, 1315; 18 Cal.Rptr.2d 796; 850 P.2d 1 (1993), cert. den., ___ U.S. ___, 114 S.Ct. 1576 (1994).[3] For any of these reasons or all of them, the writ should be denied.

I.

PETITIONER FAILED TO PRESERVE ITS FEDERAL CLAIMS DURING THE STATE APPELLATE PROCEEDINGS.

A. Petitioner's Default in the State Appellate Proceedings

The state, as petitioner, seeks a writ of certiorari directed to the California Court of Appeal for the Sixth Appellate District *based on arguments the state never presented, in any fashion, to that court*. As discussed further below, in the briefing before the state appellate court, petitioner defended the perjury conviction solely on the ground that the

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[3] But see *Masotto v. United States*, 73 F.3d 1233 (2nd Cir. 1996), petition for certiorari, No. 95-1794, pending.

trial court's removal of the materiality element from the jury was correct. At no time did petitioner suggest to the Sixth District, even as an alternative or "fallback" argument, that any error in the perjury instructions was susceptible to harmless error analysis. Indeed, even after the state appellate court issued its decision finding the removal of this element from the jury reversible, the state passed up an opportunity to present its harmless error claims to that court through a petition for rehearing. Instead, the state raised these arguments for the first time in its petition for review to the California Supreme Court. But California appellate law (like that of most jurisdictions) does not permit a litigant to raise before the state's highest court claims which it has failed to present to the intermediate appellate court. Accordingly, petitioner failed to preserve its current federal claims properly in the lower state courts, the California Supreme Court never excused that default or otherwise ruled on the merits, and this Court should not entertain these defaulted claims on certiorari.

The petition for certiorari conspicuously omits the required "specification of the stage of the proceedings" in which petitioner first raised "the federal questions sought to be reviewed" and does not "show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari." Supreme Ct. Rule 14.1(g)(i); compare Cert. Pet. pp. 2-6.[4] The relevant chronology is as

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[4] The petition does state, rather disingenuously, "We contend here, *as we did in state court*, that the error was harmless." Cert. Pet., p. 7, emphasis added. As discussed above in text, the only "state court" to which petitioner presented that contention was the California Supreme Court which, at that late stage of the proceedings, was not required to and presumably did not consider that contention on the merits.

follows: The original briefing in the California Court of Appeal occurred after this Court's grant of certiorari but before its decision in *United States* v. *Gaudin*, 515 U.S. ___, 115 S.Ct. 2310 (1995). Both parties alluded to the pendency of *Gaudin* in their respective briefs. Mitchell, relying in part on the Ninth Circuit's en banc opinion in *Gaudin*,[5] argued that the judge's removal of the materiality question from the jury violated the Sixth and Fourteenth Amendments, *and Mitchell explicitly urged that the error was a structural defect which was not susceptible to harmless error analysis.*[6] In its one-page response to this argument, the state (on the basis of California precedents) claimed only that "[t]he trial court did not err" in removing the materiality question from the jury.[7] Nowhere in its perfunctory response did the state suggest that, in the event the removal was found erroneous, the perjury verdict could nonetheless be salvaged through some form of harmless error analysis. In electing not to respond to Mitchell's argument that the erroneous removal of an element of an offense is reversible per se, the state effectively acquiesced in that point before the state appellate court.

This Court rendered its decision in *Gaudin* on June 19, 1995, and, in a case then pending before the California Supreme Court, the California Attorney General explicitly conceded that *Gaudin* applied to California's perjury statute and mandated jury

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[5] *United States* v. *Gaudin*, 28 F.3d 943 (9th Cir. 1994) (en banc), cert. gr., ___ U.S. ___, 115 S.Ct. 713 (1995).

[6] Appx. A (attached): Excerpt of Mitchell's Appellant's Opening Brief in Sixth Appellate District (pp. 55-57).

[7] Appx. B (attached): Excerpt of state's Respondent's Brief in Sixth Appellate District, p. 47.

determination of the materiality element. See *Kobrin, supra*.[8] Thus it was a foregone conclusion that the removal of that element from Mitchell's jury would be found erroneous. The Sixth Appellate District did not hear oral arguments in the *Mitchell* appeal until October 3 (Appx. C [attached]) and did not issue its opinion until December 19, 1995. Hence, if the state wished to change or supplement its "no error" argument with one of harmless error, it had plenty of time to do so. Yet the state never submitted any supplemental briefing in *Mitchell*. Even after the Sixth District issued the opinion, the state did not avail itself of the opportunity to present any such harmless error arguments to that court through a petition for rehearing.

It was not until the state's petition for review in the California Supreme Court that the state first asserted that the trial court's removal of the materiality element in this case was harmless error. The California Supreme Court's summary denial of the state's petition should come as no surprise, for the state had defaulted its harmless error arguments by failing to present them to the Sixth Appellate District either before or after the appellate court's opinion.

> As a matter of policy, on petition for review the [California] Supreme Court normally will not consider: [¶] (1) *any issue that could have been but was not timely raised in the briefs filed in the Court of Appeal*; [¶] (2) *any issue or any material fact that was omitted from or misstated in the opinion of the Court of Appeal, unless the omission or misstatement was called to the attention of the Court of Appeal in a petition for rehearing*. All other issues and facts may be presented in the petition for review without the necessity of filing a petition for rehearing.

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[8] The state made this concession in a "Respondent's Supplemental Brief on the Merits" (p. 3), filed July 5, 1995, in the California Supreme Court, in *People* v. *Kobrin*, S036656. Appx. D (attached)

Cal. Rules of Court, Rule 29(b), emphasis added.

On the basis of Rule 29(b), the California Supreme Court routinely refuses to consider arguments which were not properly raised in the intermediate appellate court.[9]

Because the state's failure to argue harmless error to the Sixth Appellate District defaulted that argument for purposes of California Supreme Court review, that omission defaulted its present federal claims for purposes of this Court's certiorari review as well. As this Court has stated many times, "when "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary."" *Exxon Corp.* v. *Eagerton*, 462 U.S. 176, 181 fn. 3 (1983), quoting *Fuller* v. *Oregon*, 417 U.S. 40, 50 fn. 11 (1974), and *Street* v. *New York*, 394 U.S. 576, 582 (1969).

This Court has specifically held that presentation of an argument for the first time in a petition to a state's highest court is insufficient to preserve an argument, especially where the state supreme court has a policy of not reviewing arguments not asserted in the lower court. *Bailey* v. *Anderson*, 326 U.S. 203, 206-207 (1945).[10] Indeed, this Court

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[9] See e.g., *Conservatorship of Susan T.*, 8 Cal.4th 1005, 1012-1013; 36 Cal.Rptr.2d 40; 884 P.2d 988 (1994); *People* v. *Bransford*, 8 Cal.4th 885, 893 fn. 10; 35 Cal.Rptr.2d 613; 884 P.2d 70 (1994), cert. den., ___ U.S. ___, 115 S.Ct. 2005 (1995); *Brown* v. *Poway Unified School Dist.*, 4 Cal.4th 820, 828 fn. 3; 15 Cal.Rptr.2d 679; 843 P.2d 624 (1993).

[10] For similar reasons, this Court has held that presentation of an argument for the first time in a petition for discretionary review by a state's highest court does not constitute "fair presentation" of a federal claim for purposes of determining whether a habeas petitioner has exhausted state remedies. See *Castille* v. *Peoples*, 489 U.S. 346, 351 (1989).

recently invoked that principle in another case arising from the California courts. *Yee* v. *City of Escondido, California*, 503 U.S. 519, 533 (1992). An argument belatedly raised in a state's highest court is only cognizable on certiorari where the state supreme court explicitly decided the issue on the merits, despite the omission in the lower courts.[11] But that exception cannot revive petitioner's harmless error claim because, as this Court correctly observed in *Yee*, the California Supreme Court's denial of discretionary review (much like a certiorari denial) does not represent a decision on the merits. *Yee, supra*, 503 U.S. at 533.

These rules requiring adequate preservation of an argument throughout the state proceedings "are as applicable to the State's failure to have opposed the assertion of a particular federal right, as to a party's failure to have asserted the claim." *Illinois* v. *Gates*, 462 U.S. 213, 221 (1983). In *Gates*, the state had defended the sufficiency of the warrant in the state courts but had never disputed the defendant's claim that the exclusionary rule would apply if the warrant was found lacking in probable cause. Since the question of the appropriate relief or disposition had not been fully litigated in the state courts, this Court ultimately found that the question of a possible good-faith exception to the exclusionary rule was not properly before it (despite its earlier solicitation of briefing on that issue). *Id*. at 217-223.[12]

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[11] E.g., *Schad* v. *Arizona*, 501 U.S. 624, 630 fn. 2 (1991).

[12] "In such circumstances, absent the adversarial dispute necessary to apprise the state court of the arguments for not applying the exclusionary rule, we will not consider the question whether the exclusionary rule should be modified." *Gates, supra*, at 223.

The same is true here: The state's only response to Mitchell's appellate claim of reversible error was a perfunctory assertion that no error occurred. Because the state's briefing in the Sixth District never disputed that, if error occurred, it was reversible, "there was never 'any real contest' upon the point." *Gates*, *supra*, 462 U.S. at 223.

Gates also illustrates the interplay between the requirement of adequate preservation in the state courts and the doctrine of independent state grounds--a consideration also present in this case. (See Part III, *infra*) "[B]y requiring that the state first argue to the state courts that the federal exclusionary rule should be modified, we permit a state court, even if it agrees with the State as a matter of federal law, to rest its decision on an adequate and independent state ground. [Citation]" *Gates*, *supra*, at 222. This consideration should deter the Court from granting certiorari even if it is uncertain whether the current record demonstrates reliance on an alternative state ground. By failing to argue to the Sixth District that the federal constitutional error was harmless, the state deprived that court of the opportunity to consider and to state explicitly whether the error was nonetheless reversible under the California Constitution.[13]

B. The State's Bypasses--*Kobrin* and *Mitchell*

This is a stealth petition. As reflected in the amount of text petitioner devotes to the case, the true object of the state's challenge is the California Supreme Court's November 1995 opinion in *People* v. *Kobrin*, *supra*. See Cert. Pet. pp. 15-18, 22-26. In

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[13] As discussed in Part III, *infra*, a long line of California opinions have recognized a state "constitutional right to have the jury determine every material issue." And, in enforcing that right, the California courts have generally applied a test of reversal which is much less forgiving of error than the federal tests for comparable errors.

contrast to *Mitchell*, *Kobrin* was a case in which the structural defect or harmless error questions were joined, briefed, and decided on the merits. The California Supreme Court solicited and received extensive briefing from both parties on whether the removal of materiality from the jury was reversible per se or susceptible to harmless error analysis and, if the latter, what form such harmless error analysis should take. See Appx. D, E, F.

Kobrin was a published opinion of the state's highest court, following a "'real contest'" and "adversarial dispute" on harmless error, of the type so lacking in the Sixth District proceedings in *Mitchell*. Cf. *Gates*, *supra*, 462 U.S. at 223. But, for reasons best known to itself, the state elected *not* to petition for certiorari in *Kobrin*. Instead, it has selected this obscure, unpublished opinion of an intermediate appellate court--to which the state never presented any of the arguments which are the basis of its certiorari petition.

The state bypassed the opportunity to bring these claims before this Court in *Kobrin*, a case in which its harmless error theories had been raised and fully considered in state court. And the state bypassed the opportunity to assert any such theories in the state appellate court in *Mitchell*. Apparently, the state would prefer to present its novel revision of structural defect and harmless error principles to this Court in a case in which the issue was not fully developed in the state courts. There is no place for such gamesmanship in this Court's certiorari process. Regardless of whether this Court views the bar on inadequately preserved claims as a jurisdictional or a prudential one, it should deny certiorari. See *Yee*, *supra*, 503 U.S. at 533; *Gates*, *supra*, 462 U.S. at 218-222.

II.

THE STATE'S INVENTIVE THEORY OF HARMLESSNESS IS INCONSISTENT WITH THIS COURT'S PRECEDENTS AND WITH THE SIXTH AMENDMENT'S GUARANTEE OF A JURY TRIAL

In its petition for certiorari, the State argues that both the California Supreme Court in *Kobrin* and the court of appeal in this case were wrong to apply a per se reversal standard to the instructional error at issue, and pe itioner proposes a harmless error model of its own devising for this Court's adoption. Stripped of its idiosyncratic "buzz words" which do not appear in any published opinion (" Jury-Findings, Evidence-Considered Test;" "Error Characterization Approach"), the State's "universal, three-step approach to analyzing instructional errors on elements of an offense," (Cert. Pet. pp. 7, 8, 10, 11, 16) turns out to be this: whether a jury was affirmatively told *not* to consider an element, or was merely not told about an element, or was given conflicting instructions on an element, a reviewing court can hold the error harmless if it finds, from "what the jury *actually did* (the findings the jury made and the evidence it considered) what the jury *would have done* (i.e., whether it would still have convicted) if had been correctly instructed." (Cert. Pet. p. 7) While this formulation sounds reminiscent of tests this Court has articulated for *rebuttable* presumptions in *Yates* v. *Evatt*, 500 U.S. 391 (1991) and *Rose* v. *Clark*, 478 U.S. 570 (1986), upon further parsing it appears that the true test petitioner proposes is this: despite the error,

> "could the jury nonetheless have made findings and considered evidence that *would* establish that the jury that *would have made* the requisite findings *if* it had been properly instructed" (Cert. Pet. p. 8, emphasis in original; italics added), and

> "did the jury nonetheless actually make findings and consider evidence establishing that the jury *would have made* the requisite findings *if* it had been properly instructed." (Id., at pp. 9-10, italics added.)

In other words, *any* instructional error that removes an element of the offense from the jury's consideration is harmless if the reviewing court can determine from what the jury found (i.e., what can be inferred from the guilty verdict) that the evidence is so overwhelming ("establishes") that any reasonable jury would have found the element, if it had been asked to do so, even though the jury, in fact, was not asked to do so.

This harmless error approach to instructions which entirely remove an element of the offense from the jury's consideration is not even as solicitous of the Sixth Amendment jury trial right as the test this Court has set out for rebuttable presumptions (which do not remove elements but merely shift the burden of proof). *Yates* instructs us that before deciding that an error did not contribute to the verdict, the reviewing court

> "must ask what evidence the jury actually considered in reaching its verdict. . . The answer must come [] from analysis of the instructions given to the jurors and from application of that customary presumption *that jurors follow instructions* and, specifically, that they consider relevant evidence on a point in issue when they are told that they may do so. . . . [I]t must then weigh the probative force of that evidence as against the probative force of the presumption standing alone. To satisfy *Chapman's* reasonable-doubt standard, *it will not be enough that the jury considered evidence from which it could have come to the verdict without reliance on the presumption.* Rather, the issue under *Chapman* is whether the jury *actually rested it: verdict on evidence establishing the presumed fact beyond a reasonable doubt, independently of the presumption*. 500 U.S. at 404, emphasis added.

This Court then took pains to correct a common but erroneous assumption made by appellate courts in applying *Chapman's* "review of the entire record" test: "that the

jury considered all the evidence bearing on the issue in question before it made the findings on which the verdict rested."

> If, on the contrary, that assumption were incorrect, an examination of the entire record would not permit any sound conclusion to be drawn about the significance of the error to the jury reaching the verdict. This point must always be kept in mind when reviewing erroneous presumptions for harmless error, because the terms of some presumptions so narrow the jury's focus so as to leave it questionable that a reasonable juror would look to anything but the evidence establishing the predicate fact in order to the infer the presumed." 500 U.S. at 405.

Although this Court need not have done so, since it did not have before it a conclusive presumption, in a footnote the Court nevertheless observed that in such a case an even more restrictive analysis had been proposed by Justice Scalia in *Carella v. California*, 491 U.S. 263 (1989). That test would narrow the inquiry to only the predicate facts to be relied on under the presumption and would require a court to determine whether "they are so closely related to the ultimate fact to be presumed that no rational jury could find those facts without also finding that ultimate fact." *Yates, supra*, 500 U.S. at 405, fn. 10 citing *Carella, supra*, 491 U.S. at 271.

The *Chapman* tests of harmless error, even as articulated in *Yates* and *Rose*, is primarily informed by solicitude for the Fifth and Fourteenth Amendments' guarantee of the due process right to proof beyond a reasonable doubt of every fact upon which every element of an offense depends. *In re Winship*, 397 U.S. 358 (1970). It is not, however, the only right at stake, when a jury is instructed not to find an element of the offense. As this Court has repeatedly pointed out, also at stake is the right to have the *jury* make the required findings, beyond a reasonable doubt. That right cannot be vindicated by the

Chapman standard of review, much less by petitioner's "could have/would have" test. For the right to have the jury decide one's fate is qualitatively different from the due process right recognized in *In re Winship, supra*, where a juvenile court judge sitting without a jury made the delinquency adjudication, or the prosecutorial misconduct that gave rise to *Chapman*, or the rebuttable presumption in *Yates*. Thus, this Court has repeatedly reminded lower courts that "[f]indings made by a judge cannot cure deficiencies in the jury's findings as to the guilt or innocence of a defendant resulting from the court's failure to instruct it to find an element of the crime." *Cabana v. Bullock* 474 U.S. 376, 384-385 (1986) quoted in *Carella v. California, supra*, 491 U.S. at 269 [conc. opn. by Scalia, J.]. The "problem would not be cured by an appellate court's determination that the record evidence *unmistakably* established guilt, for that would represent a finding of fact by judges, not by a jury. As with a directed verdict, 'the error in such a case is that the wrong entity judged the defendant guilty.'" *Rose v. Clark, supra*, 478 U.S. at 578, quoted in *Carella, supra*, 491 U.S. at 269.

This point could not have been made more clearly than it was most recently in *Sullivan* v. *Louisiana*, 508 U.S. 275 (1993), where Justice Scalia, writing for a unanimous court, observed, in the context of an erroneous reasonable doubt instruction:

> "Harmless error review looks . . . to the basis on which 'the jury **actually rested** its verdict.' . . . [cit. omit.] [T]o hypothesize a guilty verdict that was never in fact rendered - no matter how inescapable the findings to support that verdict might be - would violate the jury-trial guarantee. . . . The most an appellate court can conclude is that a jury **would surely have found** petitioner guilty beyond a reasonable doubt -- not that the jury's actual finding of guilty beyond a reasonable doubt **would surely not have been different** absent the constitutional error. That is not enough. (cit. omit.) The Sixth Amendment requires more than appellate speculation

about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal; it requires an actual jury finding of guilty." *Sullivan, supra*, 508 U.S. at 278-280.

Whether or not, as petitioner argues, instructions which omit an element of the offense should be treated exactly the same as instructions that misstate, misdefine or misdescribe an element, makes no difference in this case. That is because in this case it is absolutely clear that the trial court told the jury in no uncertain terms that *the court* had already made the determination that the statements, if made, were material. "If you find that the defendant made one or more of the statements charged, *such statements were material matters within the definition of perjury.*"[14] This instruction did not merely ask the jury to "infer" or "conclusively presume" the existence of materiality from facts yet to found by the jury. By this instruction the court went beyond "omitting" an element of the offense: it announced to the jury that the decision on materiality had already been made by the court. Put differently, the instruction directed a partial verdict against the accused on one element of the offense. "The Constitution gives a criminal defendant the right to have a *jury* determine, beyond a reasonable doubt, his guilt of *every element* of the crime with which he is charged." *Gaudin, supra*, 115 S.Ct. at 2320; emphasis added.

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[14] This instruction was virtually identical to the one given to the *Kobrin* jury: "If you find the defendant made one or more of the statements [recited by the court as part of the instruction], said statements were material matters within the definition of perjury read to you." (*Kobrin, supra*, 11 Cal.4th at 416. It is also indistinguishable on any meaningful level from the instruction condemned by this Court in *United States v. Gaudin*, supra, __U.S.__; 115 S.Ct. 2310, 2313: "[t]he issue of materiality . . . is not submitted to you for your decision but rather is a matter for the decision of the court. You are instructed that the statements charged in the indictment are material statements."

Directing a partial verdict against the defendant on one element has the same effect, when there is a conviction, as directing a verdict against the defendant on all of the elements.[15] It results in a verdict that is not wholly a jury verdict.[16] Such a verdict cannot stand in a criminal case. *Sparf v. United States*, 156 U.S. 51, 105-106 (1895); *Carpenters v. United States, supra*, 330 U.S. 395, 410; *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572-573 (1977); *Rose v. Clark, supra*, 478 U.s. at 578; *Carella v. California, supra*, 491 U.S. at 268; *Sullivan v. Louisiana, supra*, 113 S.Ct. at 2080. The reason underlying the rule is not so much logical as visceral: "The constitutional right to a jury trial embodies a 'profound judgment about the way in which law should be

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[15] See *People v. Lopez*, 71 F.3d 954 (1st Cir. 1995), cert. den., ___ U.S. ___, 116 S.Ct. 2529 (1996): "The precedents make clear that it could not be harmless error for the trial judge to direct a verdict on the case as a whole, [cit. omit.] and we think that the Court would apply the same analysis to a directed verdict on a single element of the offense. [Cit. omit.]" *Id.*, at 960; accord, *United States v. Johnson*, 71 F.3d 139, 142-143 (4th Cir. 1995) [dictum; aff'd on plain error doctrine]; *United States v. Ross*, 77 F.3d 1525, 1540 (7th Cir. 1996) [Same]; *United States v. Wells*, 63 F.3d 745, 751 (8th Cir. 1995) [vacating, without harmless error discussion, convictions in which materiality was removed from the jury], *cert. granted*, __U.S.__, 116 S.Ct. 1540 (1996). But see *United States v. Raether*, 82 F.3d 192 (8th Cir. 1996) [*Gaudin* error is subject to harmless error review, but finding it prejudicial under *Carella*-like test.]; *United States v. Baumgardner*, 85 F.3d 1305 (8th Cir. 1996) [Same].

[16] See, for example, *United States v. DiRico*, 78 F.3d 732, 737 (1st Cir. 1996): "[W]here a jury has not rendered a verdict that addresses every essential element of the charged offense, and therefore has not rendered a verdict on the crime charged, the question of whether the same verdict would have been rendered absent the constitutional error is meaningless. Here, because the jury did not determine whether the government had proved, beyond a reasonable doubt, the existence of an essential factual element of the crime of false subscription (*i.e.*, materiality) there was 'no jury verdict within the meaning of the Sixth Amendment' and harmless error analysis is inapplicable. [*Sullivan, supra*] at 278-81, 113 S.Ct. at 2081-82." Accord, *United States v. Pettigrew*, 77 F.3d 1500, 1511 (5th Cir. 1996).

enforced and justice administered.'" *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968) quoted in *Carella, supra*, 491 U.S. at 268. Its infringement "abort[s] the basic trial process." *Rose v. Clark, supra*, 478 U.S. at 578, fn. 6 "The deprivation of that right. . . unquestionably qualifies as 'structural error.'" *Sullivan v. Louisiana, supra*, 508 U.S. at 282. Under this Court's precedents, then, "the trial judge's refusal to allow the jury to pass on the 'materiality' of [respondent's] false statements infringed that right [to a jury trial]. *Gaudin, supra*, 115 U.S. at 2320. The only corrective under the federal view of directed verdicts was reversal.

Petitioner's analysis of this case fails even under the *Yates* test for rebuttable presumptions. Petitioner posits that the jury "could have" considered evidence that the DMV issued the driver's license to respondent under a false name. But why should it have? That evidence was relevant only to the question whether the statements could have influenced the outcome of the proceedings. But that, of course, is the very question which, the jury was told, the court had already decided. The questions for the jury to decide, under the instructions, were: (1) did respondent sign the application under penalty of perjury? (2) was such a declaration permitted by law? (3) did respondent knowingly lie about (a) never having had a license, or (b) not having applied for a license under a different name within the past five years, or (c) his true name ? and (4) did he lie with the specific intent to lie? The jury did not need to ask or answer the question whether the DMV issued the license in order to answer questions 1 through 4. The jury *could have* engaged in the torturous set of inferences propounded by petitioner (Cert. Pet. p. 14) from the undisputed but largely irrelevant fact that the DMV issue the

license under a false name. But since it must be presumed that the jury followed the instruction to ignore materiality, there is nothing about the findings which the jury was required to make, which ineluctably lead to the conclusion that the jury even considered, much less *actually rested* its findings on the evidence of what the DMV did. Contrary to petitioner's assertions, there is no reliable basis for concluding that in this case "the *jury* returned a verdict of guilty beyond a reasonable doubt" on all the elements of perjury. Cert. Pet. p. 17, emphasis added.

Petitioner also takes aim at *Roy v. Gomez*, 81 F.3d 863 (9th Cir. 1996) because it doesn't agree with *Roy's* analysis, thought it apparently has no quarrel with *Roy's* result, or the approach which, petitioner asserts, parallel's its own approach to harmless error, and which *Roy* actually employed. Cert. Pet. p. 20. But *Roy* is not at issue in this case;[17] it was not even cited by the parties or the court of appeal. *Roy* is not a reason to grant certiorari in this case. Nor is petitioner's proposed all purpose harmless error test. It is incompatible with this Court's recent decisions, wrong in its analysis of this case,[18] and irrelevant in any event to the partial directed verdict rendered here.

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[17] But see the State of California's Petition for Certiorari in *Roy v. Gomez*, No. 95-2025, presently pending, , which does not ask the Court to grant review for the reasons urged here and, in fact, does not discuss or cite *Rose*, *Yates* or *Sullivan*.

[18] It bears repeating that the very fact-intensiveness of petitioner's analysis highlights why petitioner should have presented its theory to the court of appeal and why this court should not entertain in the first instance an argument which could and should have been made below.

III.

KOBRIN RESTS AS MUCH ON INDEPENDENT STATE GROUNDS AS ON FEDERAL PRECEDENT.

The California Supreme Court's opinion in *Kobrin* did not, in fact, go nearly as far as petitioner would have this Court believe. The *Kobrin* Court did not unequivocally hold that removal of an element of the offense for the jury is reversible error per se. Instead it only acknowledged that "both this court and the United States Supreme Court have strongly implied that omitting to instruct on an element of an offense" is an error that "infects the structural integrity of the trial process . . . [and] is reversible per se." *Kobrin, supra*, 11 Cal.4th at 428. In a footnote, the court was quick to point out that such error could be found harmless if "'it is possible to determine that although an instruction ... was erroneously omitted, the factual question posed by the omitted instruction was necessarily resolved adversely to the defendant under other, properly given instructions.'" *Id.* at 428 fn. 8, citing *People v. Sedeno*, 10 Cal.3d 703, 721; 112 Cal.Rptr. 1; 518 P.2d 913 (1974).[19] The Court expressly declined to decide "whether, and under what circumstances, a reviewing court may determine the omission of instruction on an element was harmless beyond a reasonable doubt." *Id.*

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[19] Although petitioner at first complains that *Kobrin* "expressly declined to set forth a test under which [an omitted instruction] . . . would actually be harmless," citing *Kobrin's* footnote 8, petitioner later acknowledges that the *Kobrin* Court did set forth the *Sedeno* test, though petitioner does not use that name. Cert. Pet. p. 18.

The citation to California's venerable "*Sedeno* test" speaks volumes about the twin constitutional principles which underlie the *Kobrin* opinion.[20] Coupled with the fact that the defense briefing in *Kobrin* urged the Court to find that the state Constitution provided an alternate ground for its decision (see Appx F. [attached]), the citation to *Sedeno* underscores that *Kobrin* does rest, in part, on the state constitutional right to a jury trial. As an incident of the right to a jury trial and due process under the state Constitution, Californians enjoy a "constitutional right to have the jury determine every material issue presented by the evidence." *People* v. *Modesto*, 59 Cal.2d 722, 730; 31 Cal.Rptr. 225; 382 P.2d 33 (1963); *People* v. *Sedeno*, *supra*, 10 Cal.3d at 720; *People* v. *Geiger*, 35 Cal.3d 510, 519; 199 Cal.Rptr. 45; 674 P.2d 1303 (1984).[21] Because an instructional error which deprives a defendant of the right to a jury determination of

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[20] In *People* v. *Ernst*, 8 Cal.4th 441; 34 Cal.Rptr.2d 238; 881 P.2d 298 (1994), the California Supreme Court reaffirmed that the state Constitution protects the right to a jury trial even more zealously than the federal Constitution. The California Constitution describes trial by jury trial as "an inviolate right." Cal. Const., art. I § 16. Indeed, even an error which might be subject to harmless error analysis under federal law (e.g., absence of an express personal waiver of a jury) may be deemed reversible per se under the California Constitution. "It long has been established that the denial of the right to a jury trial constitutes a '"a structural defect[]" in the judicial proceedings"' that, by its nature, results in such '"a miscarriage of justice."'" *Ernst*, *supra*, 8 Cal.4th at 449.

[21] A Californian's right to instructions on lesser included and related offenses, and defenses, also derives primarily from this state constitutional mandate. To date, this Court has not recognized a comparable federal constitutional right in noncapital cases (see *People* v. *Geiger*, *supra*; *People* v. *Garrison*, 47 Cal.3d 746, 779; 254 Cal.Rptr. 257; 765 P.2d 419 (1989); *People* v. *Murtishaw*, 48 Cal.3d 1001, 1014 fn. 2; 258 Cal.Rptr. 821; 773 P.2d 172 (1989), cert. den., 497 U.S. 1010 (1990) [*Murtishaw* II]) although it has recognized such a right in capital cases. *Beck* v. *Alabama*, 447 U.S. 625, 638, 643 (1980).

every material issue raised by the evidence is a "miscarriage of justice" in itself under the state constitution, such error was originally considered presumptively prejudicial, and reversible per se. *People v. Carmen*, 36 Cal.2d 768, 773; 228 P.2d 281 (1951); *People v. Modesto, supra*, 59 Cal.2d at 730[22]. In *People v. Sedeno, supra*, however, the Court recognized a narrow exception to the rule of automatic reversal, holding:

> "[I]n some circumstances it is possible to determine that although an instruction on a lesser included offense was erroneously omitted, the factual question posed by the omitted instruction was necessarily resolved adversely to the defendant under other, properly given instructions. In such cases the issue should not be deemed to have been removed from the jury's consideration since it has been resolved in another context, and there can be no prejudice to the defendant since the evidence that would support a finding that only the lesser offense was committed has been rejected by the jury." 10 Cal.3d at 721.

While the *Sedeno* test is most commonly associated with the failure to instruct on a defense or lesser offense,[23] an instruction which entirely removes a distinct element

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[22] As Justice Traynor explained for the majority in *Modesto*, "[r]eversal is not required because of a reasonable probability that in the absence of the error the jury would have reached a different verdict [citation omitted], but because the defendant has a constitutional right to have the jury determine every material issue presented by the evidence. Regardless of how overwhelming the evidence of guilt may be, the denial of such a fundamental right cannot be cured by article VI, section 4 1/2 [now § 13], of the California Constitution, for the denial of such a right itself is a miscarriage of justice within the meaning of that provision." 59 Cal.2d at 730.

[23] See e.g., *People v. Wickersham*, 32 Cal.3d 307, 335; 185 Cal.Rptr. 436; 650 P.2d 311 (1982); *People v. Ramkeesoon*, 39 Cal.3d 346, 352; 216 Cal.Rptr. 455; 702 P.2d 613 (1985); *People v. Geiger, supra*, 35 Cal.3d at 532; *People v. Melton*, 44 Cal.3d 713, 746-747; 244 Cal.Rptr. 867; 750 P.2d 741 (1988), cert. den., 488 U.S. 934 (1988); *People v. Edelbacher*, 47 Cal.3d 983, 1028; 254 Cal.Rptr. 586; 766 P.2d 1 (1989); *People v. Turner*, 50 Cal.3d 668, 690-693; 268 Cal.Rptr. 706; 789 P.2d 887 (1990), cert. den., 498 U.S. 1053 (1991). [*Sedeno* applied to lesser included and related offenses] See also *People v.*

(continued...)

of an offense from the jury's consideration also eviscerates that right. The California Supreme Court recently acknowledged as much, when it held that the *Sedeno* test is the appropriate standard for instructional error going to the definition of the core elements of a charge. Thus, in *People* v. *Sheldon*, 48 Cal.3d 935, 961-962; 258 Cal.Rptr. 242; 771 P.2d 1330 (1989), the Supreme Court applied *Sedeno* to the failure to define the term "assault" in instructions on assault with a deadly weapon. Demonstrating the rigors of the *Sedeno* test, *Sheldon* held that the jury's verdict on a firearm use enhancement did not necessarily mean that the jury had determined, adversely to the defendant, the precise factual questions posed by a proper definition of assault.

Application of the *Sedeno* test to the error in *Kobrin* and in this case yields the same result. At least in *Sheldon*, the instructions on assault with a deadly weapon referred to the element of assault; the error lay simply in failing to define that term of art. In *Kobrin*, by contrast, the jury received no instructions at all suggesting that it was required to assess the materiality of appellant's statements to the specific judicial

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[23](...continued)
153-158; 125 Cal.Rptr. 745; 542 P.2d 1337 (1975); *People* v. *Stewart*, 16 Cal.3d 133, 138, 141-142; 127 Cal.Rptr. 117; 544 P.2d 317 (1976); *People* v. *Wickersham, supra*, 32 Cal.3d 307, 335-336 ["defense" of nonpremeditated, nondeliberate intentional murder]; *People* v. *Jackson*, 49 Cal.3d 1170, 1199; 264 Cal.Rptr. 852; 783 P.2d 211 (1989), cert. den., 498 U.S. 881 (1990) ["defense" of implied-malice second degree murder].

The California Supreme Court has also occasionally applied a *Sedeno*-type analysis to instructional errors which implicate federal as well as state constitutional rights. However, the Supreme Court's application of *Sedeno* to errors which do *not* offend the federal constitution--such as refusal to instruct on a lesser related offense--demonstrates that the *Sedeno* test is a state constitutional requirement which exists independently of federal constitutional standards. See *Geiger, supra*, 35 Cal.3d at 519-520, 532.

proceeding in which they were submitted. On the contrary, the court announced its own finding on the materiality element. Furthermore, the omitted element of materiality was qualitatively different than any of the elements submitted to the jury. Thus, the jury had no occasion, under other instructions, to render any findings necessarily determining those elements. *Kobrin* presented as grave a violation of the right to a jury determination of material issues as any California reviewing court was likely to encounter. Thus, both the *Kobrin* Court and the court below were obliged to reverse, on completely independent state grounds. That being so, this Court should decline to review the correctness of the reasoning or result in this case.

Finally, as discussed in Part I, *supra*, to the extent that the *Mitchell* opinion itself does not provide a more detailed discussion of the bases of its finding of reversible error, the fault lies with petitioner, which declined to raise any harmless error argument in the Sixth Appellate District. Because the state was not arguing harmless error, the state appellate court had no need and no occasion to elaborate on the state law underpinnings of its disposition. See *Illinois* v. *Gates*, 462 U.S. at 222; see also *Bankers Life & Casualty Co.* v. *Crenshaw*, 486 U.S. 71, 80 (1988).

CONCLUSION

In sum, this is the wrong case in which to attempt a definitive resolution of any questions left open by this Court's recent opinions, for numerous reasons. First, the question presented to this Court and the California Supreme Court was never presented to the intermediate court which rendered the decision the State now wants this Court to review. Second, because the particular type of element-removing instruction given here is a partial directed verdict, it will not help this Court answer whatever questions may remain regarding the proper standard of reversal for instructional errors that omit, confuse or otherwise remove an element of the offense from the jury's consideration. Finally, the conclusion of the intermediate court was correct not only as a matter of federal constitutional law, but of state constitutional law as well. The petition for writ of certiorari should be denied.

Dated: September 9, 1996

Respectfully submitted,

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PUBLISHER'S NOTE :

ORIGINAL PAGINATION IS NOT CONTINUOUS.

APPENDIX A

COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. JESS RODERICK MITCHELL, Defendant and Appellant.	)	Case No. H012785 Santa Clara County Case No. 164364/168432

APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SANTA CLARA

Honorable Thomas C. Hastings, Judge

APPELLANT'S OPENING BRIEF

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VIII

THE COURT ERRED BY INSTRUCTING THAT CERTAIN STATEMENTS WERE MATERIAL AS A MATTER OF LAW IN REGARD TO THE PERJURY CHARGE IN COUNT TEN

Mr. Mitchell was charged in count ten with having committed perjury in violation of section 118 in regard to an application for a California driver's license. (CT p. 908.) In its instruction of the jury as to that count, the court directed that the allegedly false statements were material matters within the meaning of the elements of the offense, thus removing the question of materiality from the jury. (CT pp. 1051-1052.)

Mr. Mitchell notes that this court, finding itself bound by California precedent, recently held that the issue of materiality in a perjury prosecution is properly decided by the court rather than the jury. (People v. Jiminez (1992) 11 Cal.App.4th 1611.) Significant events have occurred since that decision.

On February 3, 1994, the California Supreme Court granted review in People v. Kobrin, S036656 [formerly published at 29 Cal.App.4th 1114], a case which raises this issue and which is still pending. The Supreme Court ruled on a related issue, however, on March 2, 1995, in People v. Wiley (1995) ___ Cal.4th ___ [95 C.D.O.S. 1618, case number S034307], that the question whether a prior conviction was on charges brought and tried separately vis-a-vis a sentencing enhancement was a question of law to be decided by the court even though the validity of the prior conviction generally was submitted to the jury. Significantly, this was a 4-3 decision, with the majority placing substantial reliance on the fact this was a question involving sentencing, traditionally a matter within the province of the court. Thus, given the closeness of this decision and the difference in kind from the question presented in Kobrin, by no means is Wiley an

indicator that Kobrin will be decided with the same result. Indeed, as this court noted in Jiminez, the Supreme Court observed in People v. Figueroa (1986) 41 Cal.3d 714 that the continuing validity of earlier precedent that materiality is a question of law for the court in a perjury prosecution is in doubt in light of modern due process requirements. (People v. Jiminez, supra, 11 Cal.App.4th at p. 1622.)

In United States v. Gaudin, supra, the Ninth Circuit decided very clearly that due process, as well as the Sixth Amendment, does require the question of materiality to be decided by the jury. "However, when the judge rules that a false statement is material, and withdraws the element of materiality from the jury, the judge deprives the jury of its fact-finding duty and violates the defendant's Due Process and Sixth Amendment rights." (28 F.3d 943, 951.)

The Supreme Court's grant of certiorari on January 6, 1995, of course suggests that guidance from that court may be forthcoming not long after the anticipated decision of the California Supreme Court in Kobrin.

For now, Mr. Mitchell of course urges that the analysis of the Ninth Circuit in Gaudin is the correct view. Moreover, given the implications of his Sixth and Fourteenth Amendment rights on this issue, this court can properly place great reliance of the analysis of the federal courts. That fact, together with the very real possibility of a change in California Supreme Court jurisprudence in Kobrin, as hinted in Figueroa and as arguably suggested by the result in Wiley, Mr. Mitchell submits this court should not feel bound by a rigid application of Auto Equity Sales, Inc. v. Superior Court, supra, 57 Cal.2d 450 to long-in-the-tooth, now-questionable California Supreme Court precedent.

As discussed in Argument VI, an instructional error such as this, which entirely removes an element of the offense from the jury's consideration, is reversible per se. Thus, the judgment of conviction must be reversed as to count ten.

VII

COUNT SIX MUST BE REVERSED BECAUSE THE COURT FAILED TO INSTRUCT ON AN ESSENTIAL ELEMENT OF THE OFFENSE; IF NOT REVERSED, IT MUST BE REDUCED TO A MISDEMEANOR

A. The Instructional Error

Mr. Mitchell was charged in count six with fraudulent use of an access card in violation of section 484G(A) on September 8, 1992. (CT p. 906.)[47] The factual basis for this charge, according to the prosecutor's argument to the jury, was the use of Mr. Mirshafiei's credit card in the attempt by Mr. Russell to purchase tires and wheels from Zenith Wire Wheel Company. (See 11 RT p. 2623.)[48]

In its instructions to the jury in regard to this count, the court failed to instruct that an essential element of the charged crime was that the credit card must have been stolen. The court's instructions on the elements of the offense were as follows: "In order to prove such a crime, each of the following elements must be proved: 1. A person used an access card for the purpose of obtaining money, goods, services or anything of value, 2. The person used the access card by representing without consent that he was the holder of the access card, and 3. At the time of such use, the person had the specific intent to defraud." (CT p. 1047; 11 RT p. 2748.)[49]

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[47] Section 484g provides in pertinent part as follows: "Every person, who with intent to defraud, (a) uses for the purpose of obtaining money, goods, or services or anything else of value an access card obtained or retained in violation of Section 484e . . ." Section 484e, in turn, defines theft of an access card.

[48] The prosecutor also discussed in his jury argument the purchase of a Walkman from an appliance store with the credit card. (11 RT pp. 2689-2690.)

[49] This was a special instruction, not from CALJIC. The instruction tracks more closely the offense defined in part (b) of section 484g rather than the crime with which Mr. Mitchell was charged and as to which the jury returned a guilty verdict. Mr. Mitchell notes the prosecutor's

The prosecution presented evidence that the card was stolen. However, no amount of evidence makes up for the absence of a jury finding on an essential element, a defect which naturally flows from the court's failure to instruct on an essential element, because the absence of a jury finding equates to a denial of a jury trial on the offense, a violation of the Sixth Amendment and a structural defect as to which harmless error analysis is therefore inappropriate. (See Osborne v. Ohio (1990) 495 U.S. 103 [109 L.Ed.2d 98] [failure to instruct on an element of the offense resulted in reversal without any discussion of harmless error]; United States v. Gaudin (9th Cir. 1993) 997 F.2d 1267, rehearing en banc, (1994) 28 F.3d 943, cert. granted January 6, 1995; see also People v. Cummings (1993) 4 Cal.4th 1233 [failure to instruct on substantially all elements is reversible per se].)

Thus, the judgment of conviction should be reversed as to count six.

B. The Sentencing Error

The plain language of section 484g provides the offense is grand theft only if the goods fraudulently obtained had a value greater than $400. The wheels and tires which were ordered had a retail price of $2,600. (3 RT p. 338.) However, those goods were never delivered. The prosecution produced evidence that other items were actually purchased with the card, but there was no evidence the value of those items exceeded $400. (2 RT pp. 1432-1433.)[50]

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argument to the jury omitted the same element as the court's instruction. (11 RT pp. 2682-2683.)

[50] Should the prosecution argue on appeal the conviction should be reduced to attempted grand theft rather than misdemeanor petty theft, this argument must fail because the prosecutor did not request, and the court did not give, CALJIC No. 17.01, requiring jury unanimity as to the factual basis for this count. When the jury has returned a verdict as to a completed offense which was charged, an appellate court should not substitute a verdict as to an attempted offense, which was not charged, under these circumstances. If the conviction is not reversed and is not reduced to a misdemeanor, rather than reduce the verdict to attempted grand theft, the case would have to

APPENDIX B

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. JESS RODERICK MITCHELL, Defendant and Appellant.	H012785

Santa Clara County Superior Court No. 164364, 168432
The Honorable Thomas C. Hastings, Judge

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VIII.

THIS COURT IS BOUND BY PRECEDENT TO HOLD THAT MATERIALITY IS A QUESTION FOR THE TRIAL COURT IN PERJURY CASES.

Appellant concedes this Court held in *People* v. *Jimenez* (1992) 11 Cal.App.4th 1611, 1622-1623, review den. Apr. 1, 1993, that controlling precedent compelled it to find that the issue of materiality in a perjury prosecution such as this one is properly decided by the trial court rather than the jury. (AOB 55.)

However, believing this precedent is "long-in-the-tooth," appellant urges the Court to "not feel bound by a rigid application" of *Auto Equity Sales, Inc.* v. *Superior Court* (1962) 57 Cal.2d 450, 455. He points to conflicting Ninth Circuit case law interpreting the federal perjury statute (in which certiorari has been granted), and to the fact that the California Supreme Court has granted review on this question. (AOB 55-56, citing *People* v. *Kobrin*, No. S036656, and *United States* v. *Gaudin* (9th Cir. 1994) 28 F.3d 943, cert. granted, 115 S.Ct. 713 [argued Apr. 17, 1995].)

We respectfully respond that until the law is actually changed by a higher court, if it is, this Court continues to be bound by existing precedent. The trial court did not err. (*Jimenez*; *Auto Equity Sales, Inc.*.)

VII.

THE TRIAL COURT DID NOT ERR IN ITS CREDIT CARD FRAUD INSTRUCTIONS; ANY ERROR WAS HARMLESS.

Appellant contends his conviction of fraudulent use of an access card (count 6) must be reversed because the trial court did not instruct on an essential element, viz., that the credit card must have been "stolen." (AOB 52-53.)

Penal Code section 484g(a), under which appellant was charged (CT 906), does not require proof that the credit card was stolen. It requires proof of "use" of a credit or access card that was "obtained or retained in violation of Section 484e" and which the user knows is forged, expired, or revoked. Penal Code section 484e(a) penalizes any person who "acquires an access card from another without the cardholder's or issuer's consent or who, with knowledge that it has been so acquired, acquires the access card, with intent to use it . . . ." Penal Code section 484e(c) penalizes anyone who "receives an access card with the intent to defraud" or "acquires an access card with the intent to use it fraudulently . . . ."

Thus, theft exists by statutory definition whenever a defendant "uses" a credit card that was "received" or "acquired" and "obtained or retained" without the cardholder's consent and with "intent to use it," or with "intent to defraud." The jury need not find the card was "stolen," but only that it was obtained, retained and used without consent or with intent to defraud.

The trial court's instruction to the jury tracked more closely the language of Penal Code section 484g(b) than subsection (a),[7/] but the

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7. Penal Code section 484g provided at the time of the crime:

"Every person, who with intent to defraud, (a) uses for the purpose of obtaining money, goods, services or anything else of value an access card obtained or retained in violation of Section 484e or an access card which he or she knows is forged, expired, or revoked, or (b) obtains money, goods, services, or anything else of value by representing without the consent of the cardholder that he or she is the holder of an access card or by representing that he or she is the holder of an access card and the card has not in fact been issued, is guilty of theft. If the value of all money, goods, services and

elements defined in the instruction also fit the requirements of subsection (a). The court instructed the jury:

> "In order to prove this crime, each of the following elements must be proved: One, a person used an access card for the purpose of obtaining money, goods, services or anything else of value. Two, the person used the access card by representing without consent that he was the holder of the access card. And three, at the time of such use, the person had the specific intent to defraud." (RT 2748.)

Thus, among the elements the jury had to find were "use," "without consent" and "specific intent to defraud." We submit these findings established a violation of either Penal Code section 484e(a) or 484e(c).

In addition, appellant was charged in count 5 with receiving stolen property, to wit, credit cards. (CT 906.) The court's instructions required proof that the cards "had been stolen." (RT 2747.)

Thus, it is not reasonably likely, considering the instructions as a whole, that the jury did not understand and apply each element required by section 484g. There was no error. (E.g., *Boyde v. California* (1990) U.S. 370, 380; *People* v. *Berryman* (1993) 6 Cal.4th 1048, 1073, fn. 3; *People* v. *Clair* (1992) 2 Cal.4th 629, 663.)

Further, since the jury did unquestionably under other correct instructions find that the card was stolen, any arguable error was harmless. (*People* v. *Sedeno* (1974) 10 Cal.3d 703, 720-721.)

Appellant's subsidiary claim that the conviction must be reduced to petty theft because he did not in fact secure possession of property proved to be worth at least $400 (AOB 53-54) fails because he was proved to have acquired the credit card with specific intent to defraud. Under Penal Code section 484e(c), acquiring a card with such intent by definition constitutes grand theft. The provision in Penal Code section

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other things of value obtained in violation of this section exceeds four hundred dollars ($400) in any consecutive six-month period, then the same shall constitute grand theft."

484g, defining as grand theft the obtaining of money, good, services, et cetera, worth in excess of $400 "in any consecutive six-month period" is an alternative means of establishing grand theft, and not the exclusive means. Section 484g(a) expressly incorporates section 484e as a means of violating section 484g when the card is "used." Since acquiring the card with intent to defraud is grand theft, *use* of a card so acquired cannot be less.

APPENDIX C

*** C O P Y ***

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

IN AND FOR THE

SIXTH APPELLATE DISTRICT

RECEIVED
SEP 13 1996
APPELLATE PROJECT

PEOPLE OF THE STATE OF CALIFORNIA
vs.
MITCHELL, JESS R.
H012785
Santa Clara County No. 164364

FILED
SEP 18 1995
Court of Appeal - Sixth App. Dist.
DEPUTY

BY THE COURT

Oral argument in the above entitled cause will be heard on

OCTOBER 3, 1995 AT 1:30 PM

in the Courtroom, 333 West Santa Clara Street, Suite 1060,

San Jose, California.

Stanley, David
3104 "O" Street
Suite 195
Sacramento, CA. 95816

APPENDIX D

Supreme Court of Califo..lia

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June 20, 1995

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Re: S036656 - People v. Kobrin

Dear Counsel:

The court requests supplemental briefing on the issues of whether the materiality element of Penal Code section 118 is a question of law for the court or of fact for the jury in light of the United States Supreme Court's decision in *United States v. Gaudin* (94-514, decided June 19, 1995) 1995 W.L. 360212. The parties should also address the issue of whether any instructional error was prejudicial. Supplemental briefs are to be filed simultaneously and are due July 5, 1995; any response from either party will be due July 12, 1995.

Very truly yours,

ROBERT F. WANDRUFF
Court Administrator and
Clerk of the Supreme Court

By: John C. Rossi
Assistant Clerk-
Administrator

JCR:sf

cc: Rec.
Reg.
L.A.

APPENDIX E

COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. NATHAN PAUL KOBRIN, Defendant and Appellant.

S036656

RECEIVED
JUL 0 6 1995
First District
APPELLATE Project

First Appellate District, Division Five, No. A058595
Contra Costa County Superior Court No. 920264-9
The Honorable Edward L. Merrill, Judge

RESPONDENT'S SUPPLEMENTAL BRIEF ON THE MERITS

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. **NATHAN PAUL KOBRIN,** Defendant and Appellant.	S036656

INTRODUCTION

In a letter dated June 20, 1995, the Court requested supplemental briefing in light of *United States* v. *Gaudin* (1995) 95 C.D.O.S. 4634 on the questions of whether, in a perjury prosecution under Penal Code section 118, "materiality" is a question for the jury and, if it is, whether any instructional error in this case was prejudicial.

This brief contains seven parts. We begin by explaining why "materiality" is an element of perjury as that crime is defined in section 118. (Part I.) The remainder of the brief addresses the interrelated issues of error and prejudice. Summarizing how a reviewing court must analyze claims of erroneous instructions on elements of an offense, we set forth a "jury findings, evidence considered" approach. (Part II.) Next, we consider a conflicting approach, a so-called "instruction characterization" method, and demonstrate why it is not only incorrect but nonsensical. (Part III.) In the next two sections, we lay the conceptual groundwork for our review of the major cases in this area. First, we distinguish the "jury findings, evidence considered" approach from two other approaches: a so-called "contributing principle" test and a so-called "same result" test. Unlike the "instruction characterization" approach, these two are at least coherent, if not correct. (Part IV.) Next, we show that any given harmless error approach is a formulation of the

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Supreme Court, U.S.
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SEP 18 1996
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No. 95-1882

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

CALIFORNIA, *Petitioner*,

v.

JESS RODERICK MITCHELL, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL FOR THE SIXTH APPELLATE DISTRICT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

No. 95-1882

CALIFORNIA, *Petitioner*,

v.

JESS RODERICK MITCHELL, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL FOR THE SIXTH APPELLATE DISTRICT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

In accordance with Supreme Court rule 16, subdivisions (6) and (7), we here address several new points respondent raised in his opposition. By not addressing respondent's other points, we do not imply agreement with them.

1. The Federal Question Is Properly Before This Court Notwithstanding Our Failure To Raise It In The Court Of Appeal.

Our petition raises the federal question of whether it can be (and, if so, in this case is) harmless error for a trial court to instruct a jury that the prosecution has proved one (or more) of the elements of

the charged offense. Respondent correctly notes that we did not present this issue to the Court of Appeal, first raising it in our petition for review to the California Supreme Court. Respondent believes our omission should defeat our claim to review by this Court. Opp. at 7.

He is incorrect because he overlooks a critical fact: the Court of Appeal resolved the issue. It wrote:

> "Because the removal of the materiality issue from the jury is reversible per se, the trial court's error is incurable by harmless error analysis. (*People v. Kobrin* [1995] 11 Cal.4th [416] at pp. 428-430.) [903 P.2d 1027, 1034-1035 (Cal. 1995)]." Cert. Pet. App. A at 24.

It is an

> "'elementary rule that it is irrelevant to inquire . . . when a Federal question was raised in a court below when it appears that such question was actually considered and decided.' [Citations omitted.]" *Orr v. Orr*, 440 U.S. 268, 274-275 (1979).

This rule soundly reflects the policy behind the requirement that this Court will refrain from considering issues raised for the first time before it.

> "Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind. And in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since

> the statutes may be construed in a way which saves their constitutionality. Or the issue may be blocked by an adequate state ground." *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969).

Where, as here, the intermediate state appellate court has in fact considered the federal question, it has allayed these policy concerns. Respondent argues that "the issue was not fully developed" (Opp. at 14), but he has identified no way in which the record before this Court is deficient or how it would have been any different had we raised the issue in the state Court of Appeal. Nor has respondent explained how our failure to raise the issue prevented the appellate court from deciding the matter based on an independent state ground. Indeed, the thrust of respondent's later argument is that the Court of Appeal *did* rely on an independent state ground in that it cited *Kobrin*, which in respondent's view establishes an independent state ground for finding the error prejudicial. Opp. at 23.

Respondent contends that (1) the California Supreme Court denied our petition for review because we failed to raise the issue in the state Court of Appeal, and (2) this Court should or must enforce what he considers the state Supreme Court's procedural bar. Opp. at 10-13. To demonstrate that the state Supreme Court's denial of review rested on procedural grounds, respondent cites California Rules of Court, rule 29(b), which provides:

> "As a matter of policy, on petition for review the Supreme Court normally will not consider:

> (1) any issue that could have been but was not timely raised in the briefs filed in the Court of Appeal. . . ." Opp. at 10.

Respondent is incorrect. When the California Supreme Court summarily denies review, that denial means nothing more nor less than what it says: review has been denied. The summary denial carries no implication of the reason for the denial. See *Cole v. Rush*, 45 Cal.2d 345, 351, n. 3; 289 P.2d 450, 453, n. 3 (1955) [denial of review may mean only that an adequate ground for granting review has not been raised]; *People v. Davis*, 147 Cal. 346, 350 (1905) [denial of review is not to be taken as an expression of any opinion by the court]. Thus, when an issue could have been timely raised below but was not, and when a petition for review of that issue is denied without explanation, the conclusion does not follow (as respondent would have it) that the California Supreme Court denied the petition because the issue was not timely raised below.

Moreover, if, somehow, one could attribute a reason to the state high court's summary denial of our petition for review, respondent's contention would still fail. An unexplained refusal by the state high court to consider an issue on habeas corpus creates the presumption that the court acted on the same ground as did the lower appellate court. (*Ylst v. Nunnamaker*, 501 U.S. 797, 803 (1990). Since the Court of Appeal reached and rejected the harmless error issue on the merits, the Supreme Court's "silent denial" of review may not be interpreted as a procedural bar.

To summarize. The Court of Appeal ruled on the harmless error issue, and there is no indication that that court felt at all hampered in doing so by our failure

to argue the issue. Then, when we gave the California Supreme Court the opportunity to review the Court of Appeal's ruling, the high court gave no indication that it considered itself procedurally barred from doing so. Respondent asks this Court to reject our certiorari petition because we declined to burden the Court of Appeal with an argument that would have served no purpose and, in any event, that no state court has suggested we should have made. Moreover, respondent has failed to show how our failure to raise the issue in the Court of Appeal would adversely affect this Court's consideration of it. We conclude that our failure to raise the issue in the Court of Appeal is irrelevant.

2. Even If, As Respondent Contends, Our Harmless Error Approach Is Incorrect, This Case Presents A Perfect Opportunity For This Court To Resolve Conflicts Between The Circuits And Between State And Federal Law In California.

Respondent next attacks the merits of the harmless error approach set forth in our petition for certiorari. Opp. at 15-22. Even if his criticism is entirely justified, that is no reason for this Court to reject this case.

As respondent points out (Opp. at 20, n. 15), different circuits have ruled differently on the question of whether an instruction may be harmless if it directs a jury not to consider an element of the charged offense. Four circuits have indicated that the error is reversible per se. *People v. Lopez*, 71 F.3d 954, 960 (1st Cir. 1995); *United States v. Johnson*, 71 F.3d 139, 142-143 (4th Cir. 1995) [but not reversible as plain error]; *United States v. Ross*, 77 F.3d 1525, 1540 (7th Cir. 1996); *United States v. Gaudin*, 997 F.2d 1267, 1272 (9th Cir. 1993). The Eight Circuit has found that harmless error analysis applies.

United States v. Raether, 82 F.3d 192, 194 (8th Cir. 1996); *United States v. Baumgardner*, 85 F.3d 1305, 1310 (8th Cir. 1996). Only this Court can resolve the conflict.

At least a potential conflict also exists between the State of California and the Ninth Circuit. Under conditions unspecified in *Kobrin*, instructing a jury not to consider an element may be harmless error. *People v. Kobrin*, 11 Cal.4th at 428, n. 8; 903 P.2d at 1034, n. 8, *supra*. Under the Ninth Circuit's decisions in *United States v. Gaudin*, 997 F.2d at 1272, *supra*, and *Roy v. Gomez*, 81 F.3d 863, 866-867 (9th Cir. 1996), such error is reversible per se. Once again, only this Court can resolve the conflict.

This case is an appropriate vehicle for resolving these conflicts because the instructional error here was stark: the trial court not only inferentially but expressly directed the jury not to consider the element in question and, hence, can fairly be characterized as "[d]irecting a partial verdict against the defendant on one element [of the offense]. . . ." Opp. at 20. If, then, it matters that the element was expressly removed from the jury, this case perfectly illustrates that principle. If it matters that the element was "omitted," this case illustrates that as well. And if, as we contend, error characterization of this sort is nonsense and all that matters is the evidence the jury considered and the findings it made, this case is the perfect exemplar as well. In sum, regardless of the outcome, this case presents an ideal opportunity for this Court to resolve the vexing issue of whether it can be harmless error for a trial court to instruct a jury not to decide an element of an offense.

3. *Mitchell*'s Finding Of Prejudicial Error Rests Entirely On Federal Law.

Mitchell relied on *Kobrin* to find the instructional error per se reversible. Assessing the identical instructional error, *Kobrin* stated that such an error would be harmless in a case in which the jury necessarily resolved adversely to the defendant the factual question posed by the erroneous instruction. *People v. Kobrin*, 11 Cal.4th at 428, n. 8; 903 P.2d at 1034, n. 8, *supra*, citing *People v. Sedeno*, 10 Cal.3d 703, 721; 518 P.2d 913, 925 (1974). *Kobrin* then noted it did not need to decide "whether and under what *other* circumstances a reviewing court may determine [that] the omission of [an] instruction on an element was harmless beyond a reasonable doubt." *Ibid.* [Emphasis added.] Relying on this footnote in *Kobrin*, respondent contends that the harmless error decision in that case (and, hence, by extension, the harmless error decision in this one) rested on independent state grounds. Opp. at 23.

The contention is ludicrous. The wording of the footnote itself makes clear that the state high court left open the possibility that the omission of an element may be found harmless even in a case that does not meet the requirements of the *Sedeno* test. If that possibility exists, then failure under the *Sedeno* test cannot afford an independent and adequate state ground for reversal. From the footnote itself, then, it is clear that *Kobrin*'s reference to the *Sedeno* test means only that that test satisfies federal law and that a more lenient test may do so as well -- not that an instructional error must be reversed irrespective of federal law if it fails the *Sedeno* test.

The rest of *Kobrin* underscores the point. *Kobrin* relied on three federal cases to find the error reversible -- *Sullivan v. Louisiana*, 508 U.S. 275 (1993);

Yates v. Evatt, 500 U.S. 397 (1990), and *Rose v. Clark*, 478 U.S. 570 (1986). *People v. Kobrin*, 11 Cal.4th at 429-430; 903 P.2d at 1034-1035, *supra*. *Kobrin* never mentioned the California Constitution, a state statute, or the concept of independent state grounds, even though, as respondent notes, the defendant argued independent state grounds. Opp. at 24 and Opp. App. F. Moreover, the concurrence in *Kobrin* of Justice Mosk, who is neither hesitant about asserting independent state grounds nor indirect when he does so (*People v. Cahill*, 5 Cal.4th 478, 514; 853 P.2d 1037, 1062 (1993), Mosk, J., diss.), relies entirely on the federal constitution to reach the conclusion that the error was reversible per se. *People v. Kobrin*, 11 Cal.4th at 430; 903 P.2d at 1036, *supra*, Mosk., J., conc.

Finally, we note that in assessing the issue of prejudice of instructional errors on elements of an offense the California Supreme Court has been attempting to follow the lead of this Court for more than a decade. For example, *People v. Garcia*, 36 Cal.3d 539, 554-555; 684 P.2d 826, 833-834 (1984), tailored its harmless error ruling to what it considered the then-existing dictates of federal law. Moreover, the court expressly declined to consider whether its decision could also be justified on independent state grounds. *Id.* at 555, n. 10; 684 P.2d at 834, n. 10. Similarly, *People v. Lee*, 43 Cal.3d 666, 674-676; 738 P.2d 752, 757-758 (1987), followed this Court's then-latest harmless error dictates in *Rose v. Clark*, 478 U.S. 570, *supra*, and *Pope v. Illinois*, 481 U.S. 497 (1987). A footnote in *Lee* implied that a failure to instruct on an element might be reversible per se under *Sedeno* and its precursor, *People v. Modesto*, 59 Cal.2d 722, 730; 382 P.2d 33 (1963), but never suggested that those cases rest on independent state grounds, as opposed to then-extant understandings of federal constitutional law. *People v. Lee*, 43 Cal.3d at

675, n. 1; 738 P.2d at 757, n. 1, *supra*. And in *People v. Harris*, 9 Cal.4th 407, 429-432; 886 P.2d 1193, 1204-1207 (1994), the state high court applied this Court's analysis from *Yates v. Evatt*, 500 U.S. 391, *supra*, to find the instructional error harmless under federal law, giving no hint of independent state grounds. The state high court has attempted so consistently and so openly to adhere to federal law in this area (see also *People v. Osband*, 13 Cal.4th 622, 745; 919 P.2d 640 (1996) [failure to instruct on element of special circumstance governed by federal harmless error standard]; *People v. Johnson*, 6 Cal.4th 1, 44-45; 859 P.2d 673, 697-698 (1993) [same]) that Justice Kennard has repeatedly urged this Court to clarify that law. *People v. Osband*, 13 Cal.4th at 745, n. 3; 919 P.2d 640, 719, n. 3, *supra*, Kennard, diss.; *People v. Wims*, 10 Cal.4th 293, 328, n. 10; 895 P.2d 77, 98, n. 10 (1995), Kennard, J., conc. and diss.; *People v. Harris*, 9 Cal.4th at 460-461; 886 P.2d at 1227, *supra*, Kennard, J., conc. and diss. At the same time, Justice Mosk has written in this context that the California Supreme Court is

> "under a solemn obligation to interpret and implement the United States Constitution. We are no less capable of discharging that duty than any other court." *People v. Harris*, 9 Cal.4th at 449, n. 1; 886 P.2d at 1219, n. 1, *supra*, Mosk, J., conc. and diss.

If this issue created any possibility of independent state grounds, justices Mosk and Kennard would have entertained that possibility, rather than simply discussing the lack of clarity in federal law. One can hardly imagine a more clear example of an issue that the state has not resolved on independent state grounds.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be granted.

Dated: September 17, 1996.

Respectfully submitted,

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